IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-793

No. ———

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
BURLINGTON NORTHERN, INC.,
THE COLORADO AND SOUTHERN RAILWAY COMPANY,
FORT WORTH AND DENVER RAILWAY COMPANY,
THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY
COMPANY, AND SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Respondents

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 20, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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* Now modified as 49 U.S.C. § 10101 *et seq.* in the *Revised Interstate Commerce Act* (P.L. 95-473, 92 Stat. 1337).

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v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Houston Lighting and Power Company ("Houston") and petitioner Arizona Electric Power Cooperative, Inc. ("Arizona") jointly pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on June 26, 1979.

OPINIONS BELOW

The June 26, 1979, opinion of the Court of Appeals, which is not yet officially reported, appears as Appendix A to this Petition.[1] A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals in an order dated August 22, 1979, not officially reported, which is attached hereto as Appendix B. The November 28, 1977, decision and order of the Interstate Commerce Commission ("I.C.C." or "Commission") in its *Docket No. 36612, Incentive Rate On Coal—Gallup, New Mexico To Cochise, Arizona,* reported at 357 I.C.C. 683 (1977), and the November 28, 1977, decision and order of the Commission in *Docket No. 36608, Incentive Rate On Coal—Cordero, Wyoming To Smithers Lake, Texas,* reported at 358 I.C.C. 537 (1977), which were affirmed by the Court of Appeals, appear, respectively, in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1979, and appears as Appendix E. The order denying rehearing (Appendix B) was entered August 22, 1979. This Petition for Certiorari is thus timely filed under 28 U.S.C. § 2350. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In these separate but similar cases, the Interstate Commerce Commission interpreted and implemented, for the first time, a new provision in the Interstate Commerce Act for gauging maximum reasonable rail-

[1] The appendices are separately bound in a companion volume cited as "Pet. App. —."

road rates added by the *Railroad Revitalization And Regulatory Reform Act of 1976,* Pub. L. No. 94-210, 90 Stat. 31 (1976) ("*4-R Act*"). This question of first impression was precipitated by circumstances of the utmost concern to our national interest—the massive effort of major consumers of gas and oil to convert to abundant, domestic coal. The questions presented are:

1. Whether the *4-R Act* changed the standards of maximum rate reasonableness for rail freight rates in a fashion which justifies permitting the monopoly-powered railroads of the west to expropriate, through inflated freight rates, the economic benefits flowing from the massive efforts of major western energy consumers to convert from high-priced oil and gas to cheap, domestic coal.

2. Whether the lower court erred in affirming unreasoned and arbitrary agency action because it was a "temporary approach" when the approach was permanent and final for petitioners.

STATUTORY PROVISIONS INVOLVED

The relevant statutes are Sections 101(b), 205 and 206 of the *4-R Act* which are set forth in full in the Appendix. These sections added or amended Sections 1(5), 15(19) and 15a(4) to the Interstate Commerce Act which now appear in the new Revised Interstate Commerce Act as Sections 10101, 10729 and 10704(a)(2) of Title 49, United States Code.

STATEMENT OF THE CASE

A. The Genesis Of These Disputes.

The severity of our nation's energy problems and their impact on our economy need no documentation.

They confront us daily. Among the earliest to feel the impact of our growing shortage of certain fuels were the electric utilities of the west and southwest who suddenly saw their seemingly endless supplies of natural gas and oil dwindle away or be denied to them by state and/or federal laws and regulations.

The best and most immediate solution to our nation's energy and its derivative economic problems rests with the increased industrial utilization of our cheap, abundant, and environmentally sound supplies of bituminous coal. Huge such coal deposits are found in many regions of the west. Houston and Arizona were among the first major consumers of gas and oil in the west to start upon the long and very costly process required to convert from the use of oil and gas to coal.[2] Along the way, they had to find ways of raising the billions required for coal burning plants; contend with a variety of environmental litigations;[3] and overcome legal problems concerning access to coal supply much of which is owned by Indian Nations. None of these formidable obstacles to their new use of coal proved to be as vexing, permanent, or severe, however, as the railroad problem. The prosperous coal hauling roads of the west are the sole current means of transportation between the distant coal fields and the sites of the Houston and Arizona power plants.[4] In 1974, when Houston and Arizona committed themselves to the future and long-term utilization of coal, the going price for coal transportation, which generally makes up between one-half and three-quarters of the delivered coal cost,[5] was vastly less than the price demanded by the same railroads as the plants neared completion.[6] Flexing their new market power created by OPEC actions, the railroads sought to extract greatly increased profits from the massive new coal movements which were captive to their lines.

B. Proceedings At The I.C.C.

With the railroads unwilling to discuss or negotiate their spiraling coal transportation price demands, which prices are passed directly on to the electric cus-

[2] The combined *initial* annual coal requirements of Houston and Arizona are 6 million tons, which displaces 18 million barrels of oil, or 108 million mcf of natural gas! Houston could ultimately consume over 100 million tons of coal annually if it converted totally to coal.

[3] This Court had occasion to deal with environmental issues associated with the development of some of the very same western coal reserves here involved in *Kleppe* v. *Sierra Club,* 427 U.S. 390, 396 (1976).

[4] The railroads have aggressively protected their monopoly over transportation of western coal by successfully opposing the construction of coal slurry pipelines, the only other feasible mode of transport. See e.g., *Hearings Before the House Committee on Interior and Insular Affairs on Coal Slurry Pipeline Legislation,* 94th Cong., 1st Sess. (1975), Serial No. 94-8, p. 917 *et seq.*

[5] Thus, in Houston's case the coal currently costs in the neighborhood of $6.00 per ton, while the cost of rail transportation from the mine to the plant is roughly $19.00 per ton.

[6] For example, Houston had been quoted rail prices which were nearly doubled following its commitment to coal power. Subsequently, is a nearly identical situation in San Antonio, the Commission was to describe the approach of these same railroads as "bait and switch tactics" where the receiver "was persuaded to enter into particular long-term arrangements for the supply of coal as fuel based upon a perceived bargain with defendants. Once these commitments had effectively eliminated the railroads' competition, they engaged in various pricing maneuvers in an attempt to use their newly monopolistic position to enhance their revenues." *San Antonio, Texas* v. *Burlington Northern, Inc.,* Docket No. 36180, Decision Served October 25, 1979 (unprinted), p. 9, (Appeals docketed, Nos. 78-2051, 78-2216, and 78-2307, D.C. Circuit).

tomers, Houston and Arizona instituted formal proceedings before the I.C.C. to secure its prescription of a just, lawful, and non-discriminatory rail rate for their coal transportation requirements.

While these proceedings were in progress, the railroads resorted to an as then untried provision of law authorizing railroads to propose so-called, capital incentive rates.[7] The rates so proposed by the railroads were at truly exalted levels. For example, the rate proposed by the railroads to Arizona was at a level nearly three (3) times greater than the rate prescribed a few months earlier by the Commission as the maximum on a new coal movement to San Antonio, Texas.[8]

While Houston and Arizona vigorously challenged the lawfulness of the use of these new ratemaking procedures in connection with their new coal movements, the real dispute was over the amount per ton of the proposed rates. Both Arizona and Houston asserted that the railroad rate proposals were unlawfully high when measured against the costs of the services; the rates for similar movements; and the requirements of the public interest—the traditional rail ratemaking considerations.[9] The railroads argued that under the

[7] This statutory provision was added to the Interstate Commerce Act by Section 205 of the *4-R Act* which appears at Pet. App. 1f. The Commission has since noted that the unique capital incentive rate procedures were employed in these cases by the railroads as an "economic weapon." *Capital Incentive Rate Regulations*, 361 I.C.C. 778, 789 (1979).

[8] *San Antonio* v. *Burlington Northern, Inc.*, 355 ICC 405, *aff'd sub nom., Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977).

[9] See, e.g., *Burlington Northern, Inc.* v. *United States*, *supra*, 555 F.2d, 641; *Westinghouse Electric Corp.* v. *United States*, 388 F. Supp. 1309, 1317 (W.D. Pa. 1975).

new law, they were entitled to engage in demand pricing on captive coal traffic so as to generate extra revenues to cross-subsidize deficit traffic of other types.

The Commission, after taking evidence and argument, approved each rate exactly as filed by the carriers. The primary basis relied upon for its orders approving the rates was the new provision of the *4-R Act* which directs the Commission to assist railroads in attaining adequate revenues. (Pet. App. 17c, 24d)[10] Since it had not defined what constituted adequate railroad revenues; whether these railroads enjoyed them or not; or how they were to be achieved in a case involving only a single movement of traffic, the Commission fashioned some "proxy tests" for these purposes in the Houston case. (Pet. App. 24d) As to the Arizona movement, the Commission simply observed that the extremely high and demand-based rate would result in increased profits for the railroads which would help meet the *4-R Act* goals of revenue adequacy. (Pet. App. 18c) The unreasoned and unprincipled ratemaking determinations of the agency which were reached in these cases are perhaps best revealed in the fact that while each utility receives essentially the same transportation service, the rate approved in Arizona is nearly twice as high as the rate approved in Houston [11] which rate was itself vastly greater than the prevailing rates for similar movements. (Pet. App. 20d)

[10] This provision, Section 206 of the *4-R Act* is set out at Pet. App. 2f.

[11] Expressed in comparable terms of mills per ton mile (per ton rate ÷ mileage), the Houston rate was 9.71 mills and the Arizona rate 16.5 mills.

C. The Court Of Appeals Decision.

Upon review,[12] the lower court first agreed that the railroads were entitled to have their tariffs considered under the new capital incentive procedure. (Pet. App. 8a-20a) It then turned to its review of the Commission's treatment of the lawfulness of the proposed coal rates noting that they must be evaluated by the same standards under which all other railroad rates are to be measured. (Pet. App. 20a) The court quickly dispensed with the Commission's treatment of the issues of costs and comparable rates which had, heretofore, been crucial in rail rate cases as matters for "agency expertise." (Pet. App. 26a-28a) Rather, it focused its consideration on the Commission's interpretation and implementation of the new railroad revenue need provisions of the *4-R Act* which, in agreeing with the Commission, it held had worked a "modification of the regulatory approach" to the establishment of maximum railroad rates. (Pet. App. 31a) After first observing that the Commission had yet to issue the regulatory standards mandated by the new law to measure revenue need and to relate a carrier's overall need to a specific movement, the court examined the Commission's findings as to the lawfulness of each rate under the new ratemaking standard which the agency utilized. The new standard was said to justify the use of the demand pricing principles upon which the Arizona rate was based. (Pet. App. 32a) Seemingly mindful of the fact that there is no upper limit to this type of demand-based pricing on captive traffic such as coal, the court wrongly cited some limits placed on the Houston rate as a limitation on the Arizona rate. (*Id.*) It thus finessed the hard question of where the upper limits lay. The court

[12] Jurisdiction in the lower court was asserted under 28 U.S.C. § 2341 *et seq.* and the Houston and Arizona cases were consolidated.

then reviewed the totally different reasons and standards employed by the I.C.C. in the Houston case which it identified as "proxy tests." the court was forced to admit that it had "problems in tracking and understanding the Commission's approach" but then in effect said that although the agency's path was only "dimly discerned" it could not say it was wrong. (Pet. App. 33a) In the final analysis, as to both cases, it let the flimsy reasoning relied upon by the I.C.C. scrape by on the theory that it was only a "temporary approach" to railroad, maximum rate regulation. (*Id.*)

As a consequence of the court's affirmance of the Commission's two separate orders, each of which is based on a very different ground and both of which are bereft of reasoned findings, the crucial questions of how our nation's burgeoning coal transportation needs will be priced has degenerated into chaos of unprecedented dimensions. Because the court affirmed the landmark agency implementation of a new system of railroad rate regulation in cases where the agency neglected to articulate or explain its reasons, there exists today no guidance on the principles, standards, or criteria whereby maximum reasonable railroad rates are determined for coal transportation or for that matter, any other transportation. This vacuum has led to ensuing litigation of unprecedented volume and financial consequence.

REASONS FOR GRANTING THE WRIT

1. The Pricing Of Coal Transportation Is Too Important To The National Interest To Go By Default

The cases here are the tip of a mushrooming iceberg. The I.C.C.'s orders affirmed by the lower court have heralded a new era of railroad rate regulation which is

totally without metes, bounds, or recognizable principles. While the Commission and the court have each emphasized the emergence of a new, rail regulatory scheme centered around rail revenue needs, they have done little else. The railroads, the new coal users, and the public have been left without any rational standards or guidelines for establishing maximum rates on captive coal traffic under the new regulatory regime. The results of these omissions are predictable.

Since these decisions were handed down, a firestorm of coal rate litigation has ensued, as emboldened railroads seek to exact staggeringly high rates and rate increases from captive coal traffic. The reactions of the I.C.C. have been unreasoned, fluctuating, and no less unsatisfactory than its analysis in the Houston and Arizona cases. Coal rates have been set over an irreconcilable spectrum on a case by case basis without rhyme or reason. Indeed, one Commissioner has repeatedly castigated the agency for its "disjointed and inconsistent approach to the western coal rate cases" [13] while another has labeled the decisions in these cases as "the height of arbitrary and capricious action" and a "wholesale retreat from reasoned decision-making." [14]

At this very moment, there is a multitude of financially consequential coal rate cases in vigorous litigation

[13] *San Antonio, Texas* v. *Burlington Northern, Inc.*, Docket No. 36180, Decision Served June 1, 1979 (unprinted), p. 17 (dissenting opinion of Commissioner Gresham) (Appeals docketed, Nos. 78-2051, 78-2216 and 78-2307, D.C. Circuit).

[14] *Annual Volume Rates on Coal—Wyoming To Flint Creek, Arkansas,* Docket No. 36970, and *Southwestern Electric Power Co.* v. *Burlington Northern, Inc.*, Docket No. 26980, Combined Decision Served May 25, 1979) (unprinted), (dissenting opinion of Commissioner Christian Served June 20, 1979), p. 1 ("SWEPCO") (Appeals docketed, No. 79-2082, 5th Circuit, and No. 79-1547, D.C. Circuit).

before the Commission [15] and the federal courts.[16] All of these cases are identical to the cases here in the sense that each grapples to the satisfaction of no one with the standards and criteria for establishing maximum reasonable rail rates on the emerging movements of coal from western origins and elsewhere. Both the nation's prospective coal consumers [17] and the United States Department of Energy [18] have charged that the I.C.C.'s erratic and unreasoned administration of the *4-R Act* rate provisions is having a "chilling effect" on coal conversion. Only very recently the I.C.C. itself has verified that as rail rates escalate, coal usage shrinks and foreign oil makes up the difference.[19]

It is respectfully submitted that the manner in which our nation's enormous coal transportation requirements are to be priced is a matter of such compelling national consequence as to merit the attention and guidance of the Court. No matter where one stands on the merits, all must be in agreement that the existing situation is chaotic, conflicting and satisfactory to none.

[15] A list of coal rate cases currently pending before the Commission is set out in Appendix G.

[16] A list of 27 appeals filed by shippers, railroads and the States of Texas and Kentucky is set out in Appendix H.

[17] *Escalation of Railroad Coal Tariffs, Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce,* 98th Cong,, 1st Sess. (April 16, 1979) ("*Hearings*"). Statement of Bruce A. Melaas of Celanese Chemical Company.

[18] *Id.* Statement of Lynn R. Coleman, General Counsel, United States Department of Energy.

[19] *Ex Parte No. 347, Western Coal Investigation—Guidelines For Railroad Rate Structure,* Draft Environmental Impact Statement served October 19, 1979, p. xiii.

The root cause of the current chaos in maximum rate regulation by the Commission is its acceptance of overall railroad "revenue need" as its loadstone and primary guide in judging the lawfulness of specific rates without in any rational fashion relating such overall needs to the rate for a particular movement or even making any determinations of the extent to which, if at all, the revenues of the individual carriers involved are inadequate. In affirming the Commission's decisions in the Houston and Arizona cases, the Court of Appeals chose to overlook the fact that there was absolutely no attempt to meaningfully relate revenue adequacy considerations to the rate approved for Arizona and excused the incomprehensible attempt of the Commission to quantify the effect of this new standard in the Houston case on the grounds that it was but a temporary approach. It is a fundamental principle of administrative law that before a reviewing court can affirm the decision of any agency under the standards set out in the Administrative Procedure Act, the court must be able to understand the basis for that decision. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 165-68 (1962); *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 762-63 (1963); *Atchison, T. & S. F. Ry. Co.* v. *ICC,* 580 F.2d 623, 634 (D.C. Cir. 1978). The need for reasoned explanation of agency action is particularly important where such action entails a departure from prior norms, *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 808 (1973); *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652-53 (1954).

In these cases the Commission prejudged the result of a then-pending rule-making proceeding to conclude that Section 205 revenue adequacy considerations should be a factor in judging the lawfulness of individual rates. In doing so it rejected a body of established precedent that "lack of adequate revenues from operations as a whole affords no reliable measure of the reasonableness of rates . . . on individual commodities." *Scott County Milling Co.* v. *Butler R.R.,* 194 I.C.C. 763, 785 (1933).[20]

Having concluded that the *4-R Act* worked a major change in the law governing maximum rate reasonableness, it was incumbent upon the Commission, at an absolute minimum, (a) to make some coherent determination as to whether or not the railroads involved, in fact, were enjoying "adequate" revenues as contemplated by Section 205 of the *4-R Act;* and (b) if the determination was that they were not, to relate in a meaningful and understandable way the degree of inadequacy in the carriers' overall revenues to the need for the extremely high rates approved in these cases. There were no such findings made by the agency and the Court of Appeals confessed that it was unable to understand the Commission's only attempt to deal with this issue. Thus, the court should have vacated the Commission's decision and remanded for a proper consideration of this matter. Its failure to do so was error.

As noted, the basis for the court's action in affirming the Commission's decisions notwithstanding the patent lack therein of sufficient findings or explanations on the determinative new ratemaking criteria supposedly ordained by the *4-R Act,* was that the Commission's approach was only temporary. But the fact that an agen-

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[20] The Circuit Court itself recognized that "under traditional principles, a carriers revenue needs had no relevance to the determination of the reasonableness of any individaul rate." Pet. App. 31a.

cy's decision may deal with a new statutory provision or that it is not intended by the agency to represent its final position on the issues presented can afford no basis for departing from the rule requiring the agency to spell out the legal basis for its decision so that a reviewing court can determine whether proper legal standards were applied. As the District of Columbia Circuit itself stated on a different occasion: "Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where . . . the area under consideration is one wherein the Commission's policies are in a flux." *Greater Boston Television Corporation* v. *F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970). See also *Port Terminal Railroad Ass'n* v. *United States,* 551 F.2d 1336 (5th Cir. 1977).

It most also be noted that the Court of Appeals erred in several respects in its judgment that the "temporary" nature of the Commission's approach in these cases warranted a relaxed standard of review. In the first place, the court's perception that the Commission's "dimly discerned" revenue-need analysis was a temporary phenomenon was erroneous. The court's opinion indicates that comprehensive revenue adequacy standards were established in rulemaking proceedings concluded in January, 1978, thus making the Commission's decisions here isolated instances. (Pet. App. 30a) In fact, however, the *ad hoc* approach utilized by the Commission in these cases is to this day the manner in which the Commission establishes or evaluates maximum rates for captive coal traffic.[21] More important, however, is the fact that even if the approach were temporary, the chaos in the area of coal freight rates brought on by these decisions is too damaging to this country's national energy policy objectives and other public interests to permit the hands-off attitude adopted by the Court of Appeals. Elsewhere the D.C. Circuit has noted the special importance of comprehensive agency findings where the public interest demands close scrutiny of the agency action. *Brooks* v. *Atomic Energy Commission,* 476 F.2d 924 (D.C. Cir. 1973).[22]

[21] *See,* e.g., *SWEPCO, supra* n.14; *Increased Rates On Coal, Colstrip and Kuehn, MT to Minnesota,* Docket No. 37105 Decision Served October 26, 1979 (unprinted) (Appeal docketed, Nos. 79-2286 and 79-2295, D.C. Circuit).

As the plethora of cases engendered by the Commission's decisions in these cases dramatically illustrates, there was and is an urgent need for the Court to impose upon the Commission the discipline of formulating rational guidelines for maximum rate regulation under the *4-R Act*. The tremendous public interest concerns involved in these proceedings—the effect of excessive freight rates on the nation's coal conversion program; the inflationary impact of such rates;[23]

[22] It is axiomatic that the requirements of the public interest should be the foremost consideration in determining the reasonableness of rates. *See, e.g., Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592 (1948); *Hansen Packing Co.* v. *Baltimore & O. Co.,* 201 I.C.C. 75, 77 (1934); *Southern Class Rate Investigation,* 100 I.C.C. 513, 603 (1925). The *4-R Act* continued to recognize this principle in its policy section declaring it to the "the policy of the Congress in this Act . . . to balance the needs of the Carriers, shippers and public. . . ." *4-R Act,* Section 101(b)(1).

[23] The current coal freight rate situation also entails threatening portents for the nation's balance of payments problems. In the face of extremely high rates and continuing uncertainty over the governing principles of ICC rate regulation, there is a growing interest in foreign coal among coal consumers in coastal areas. A utility in Florida is importing major volumes of Polish coal and a utility in Texas has recently purchased a test load of South African coal. *Hearings, supra,* statement of M. L. Borchelt of Central Power and Light Company.

the plight of the electricity consumers who must pay for them in their monthly utility bills; and the necessity to provide for the legitimate needs of the railroads —all demand that the issues involved in these cases be dealt with immediately rather than put off in hopes that the Commission will some day, some way improve its performance.[24]

2. Unlike All Other Coal Receivers, If This Petition Is Denied Petitioners Will Get No Second Chance

Totally apart from the deficiencies in the court's decision discussed above, there is a separate and compelling reason why its action in permitting the Commission's inadequate revenue need analysis to scrape by in these cases because it was a temporary approach was clear error. Under the unique statutory provision involved in these cases, a rate, once approved by the Commission, cannot thereafter be set aside by the Commission for a period of five (5) years. Thus, even if the Commission had now or were soon to formulate comprehensive standards for the application of revenue need considerations in individual rate cases, it would be of no benefit to Houston or Arizona or the ratepayers which they serve. As a result, allowing the Commission's decisions in these cases to become final on the basis that satisfactory quidelines for future application will be forthcoming, works a terrible injustice

[24] For more than a year the Commission has been suggesting that some guidance in this area may be forthcoming in *Ex Parte No. 347, supra* an investigation into the western coal rate structure, but the pendency of this proceeding cannot continue to serve as an excuse for the Commission's errors in individual cases or for its failure to meaningfully address these crucial issues in cases where they serve as the basis for Commission action. *Farmers Union Central Exchange* v. *F.E.R.C.*, 584 F.2d 408 (1978), *cert. den.* —— U.S. ——, 99 S.Ct. 596 (1978).

upon these litigants who will be foreclosed from the opportunity of having their rates reexamined by the Commission for conformance to such guidelines. In light of this peculiar circumstance, alone, the Court should not have applied a relaxed standard of review in these cases.

It should be noted that neither of the precedents relied upon by the court for relaxing the review standard for a temporary approach involved an analogous situation. In each, potential harm to the parties from the agency's use of its temporary approach would be minimized by the fact that the parties would be in a position to benefit from a subsequently developed, more carefully considered approach.[25]

Although, for the reasons discussed herein, petitioners urge this Court to grant certiorari in these cases at this time, if the Court should be inclined not to do so, petitioners request that rather than denying the petition, action be deferred until such time as the issues raised are taken up by the Court. Without appearing presumptuous, it seems certain that the issues involved in the Commission's regulation of rates on this commodity, which is critical to this country's future, not only in terms of energy, but also for the inextricably related economic, political, and even military reasons, are destined to come before the Court. The number of disputes involving these same basic issues is large and growing. The monies involved in the aggregate in these

[25] See *United States* v. *CAB*, 511 F.2d 1315 (D.C. Cir. 1975); *Public Service Comm'n* v. *FPC*, 467 F.2d 361 (D.C. Cir. 1972). In fact, in both of these cases, the emergency agency actions involved were subsequently set aside by the court. See *United States* v. *CAB, supra; Public Service Comm'n* v. *FPC*, 511 F.2d 338 (D.C. Cir. 1975).

cases are truly staggering. The resolution of the problem will ultimately affect the pocketbook of virtually every electric consumer in the United States.

If, as it seems inevitable, this Court must ultimately address these consequential matters, but it chooses not to do so now, the unique circumstances of these petitioners warrant deferring action on their petition so that the coal transportation prices paid by their millions of customers who directly bear these charges can be conformed to whatever guidelines are finally fashioned.

CONCLUSION

For the reasons discussed herein, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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Respondents

On Joint Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2070

HOUSTON LIGHTING & POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

BURLINGTON NORTHERN, INC., INTERVENOR

No. 77-2071

ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ATCHISON, TOPEKA AND SANTA FE RY. CO., ET AL.,
INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued December 13, 1978

Decided June 26, 1979

William L. Slover, with whom *C. Michael Loftus* was on the brief, for petitioner.

Kenneth G. Caplan, Deputy Associate General Counsel, Interstate Commerce Commission, with whom *Mark L. Evans*, General Counsel, Interstate Commerce Commission, was on the brief, for respondent.

Howard J. Trienens a member of the bar of Supreme Court of Illinois pro hac vice by special leave of court with whom *R. Eden Martin, Richard J. Flynn*, and *Lee A. Monroe* were on the brief, for intervenors.

John L. Hill, Attorney General of Texas, *David M. Kendall*, First Assistant Attorney General, *Pete Schenkkan*, Special Assistant Attorney General and *David Hughes*, Assistant Attorney General of Texas were on the brief, for State of Texas, amicus curiae in support of petitioner.

Also, *Ellen K. Schall*, Attorney, Interstate Commerce Commission, entered an appearance for respondent Interstate Commerce Commission.

Also, *Robert Lewis Thompson, Robert B. Nicholson* and *Edward E. Lawson*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

Before BAZELON, LEVENTHAL and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: These consolidated petitions for review bring before the court for the first time a new provision added to the Interstate Commerce Act by the Railroad Revitalization and Regulatory Re-

form Act of 1976 (the "Reform Act").[1] That provision, now revised and codified as 49 U.S.C. § 10729, provides for expedited consideration by the Interstate Commerce Commission (ICC or Commission) of any proposed rate filing by a rail carrier that is for new service requiring a total capital investment of $1,000,000 or more. If the Commission does not find the proposed "capital incentive rate" unlawful within 180 days after the filing of a notice of intent to establish such a rate, the rate may not be suspended or set aside for five years after it becomes effective.[2]

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[1] Pub. L. No. 94-210, 90 Stat. 41.

[2] Section 10729 provides in full:

> (a) A proposed rate, classification, rule, or practice for transportation by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title requiring a total capital investment of at least $1,000,000 to implement shall be established and become effective under this section. This section applies whether the investment is made individually or collectively by the carrier or by a shipper, receiver, or agent for any of them, or by a third party.
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> (b) A rail carrier may file a notice of intent to establish a rate, classification, rule, or practice under subsection (a) of this section with the Commission. The notice must include a sworn affidavit detailing the anticipated capital investment. Unless the Commission after holding a proceeding under subsection (c) of this section, decides by the 180th day after the notice is filed that the proposed rate, classification, rule, or practice would violate this subtitle, the carrier may establish that rate, classification, rule, or practice at any time during the next 180 days, and it may become effective 30 days after it is established. Once a rate, classification, rule, or practice becomes effective under this section, the Commission may not, for 5 years, suspend or set it aside as violating section 10701, 10726, 10741-10744, or 11103 of this title. However, the Commission may order the rate, classification, rule, or practice to be revised to a level equal to the variable costs of providing the transportation when the

Petitioners are electric utilities which have committed themselves to the construction of large coal-fired electric generating units and which have entered into supply arrangements with western coal producers. They challenge the ICC's approval of capital incentive rates proposed by railroads for the movement of coal from mines to the generating units.

Petitioners have two main claims. First, they challenge the Commission's jurisdiction to consider the proposed rates under § 10729. They contend that the railroads' proposed capital investments are not of the kind contemplated by § 10729, and that, in any event, the Commission's determinations that the $1,000,000 threshold requirement was met lacked evidentiary support. Second, even assuming that § 10729 was properly invoked, they challenge the Commission's findings that the proposed rates were just and reasonable. We affirm.

I. BACKGROUND

The two proceedings under review are similar both in factual background and legal issues presented.

Commission finds the level then in effect reduces the going concern value of the carrier.

(c) On request of an interested person, the Commission shall hold a proceeding to investigate and determine whether the rate, classification, rule, or practice proposed to be established under this section complies with this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading.

Section 10729 revised and codified § 15(19) of the Interstate Commerce Act, 49 U.S.C. § 15(19) (1976). *See* Pub. L. No. 95-473, 92 Stat. 1337 (1978). For convenience we refer to the new section. Although the codification was intended to work no substantive changes, some of the changes in language do bear on the issues here and will be noted where appropriate.

Houston Lighting and Power Co. (HL&P), the petitioner in No. 77-2070, provides electricity to a large portion of the Texas Gulf Coast, including the city of Houston. To meet rising demand, HL&P began construction of its W.A. Parrish Station at Smithers Lake, Texas. Responding to the current emphasis on use of domestic coal resources to reduce dependence on foreign petroleum and scarce natural gas supplies, HL&P decided to use coal to fire the two 660,000 kilowatt generating units making up the Parrish Station. When in full operation, the two units will consume nearly five million tons of coal a year. HL&P entered into an agreement for the supply of its long-term coal requirements from a mine near Decker, Montana. Because that mine was not yet productive, HL&P contracted to obtain at least 12.7 million tons of coal from the Jacobs Ranch Mine near Reno, Wyoming.

The coal from Wyoming was to move by railroad in unit trains of approximately 100 cars over a 1607 mile route from Cordero, Wyoming, to Smithers Lake. Of the 1607 miles, the major portion, 1308 miles from Cordero to Ft. Worth, Texas, is over the lines of the Burlington Northern (BN) and its affiliates. The remainder, the 299 miles from Ft. Worth to Smithers Lake, is on the lines of the Atchison, Topeka & Santa Fe (Santa Fe). A dispute arose between HL&P and the railroads over the terms under which the coal would be transported. Negotiations for the publication of a tariff applicable to its coal shipments proved unfruitful, and HL&P found it necessary to purchase 1,200 large-capacity coal cars when the carriers indicated their unwillingness to provide such equipment. In May, 1977, HL&P filed a complaint with the ICC requesting that it prescribe just and reasonable rates and regulations for its coal traffic.[3]

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[3] *See* 49 U.S.C. § 10704(a)(1), Pub. L. No. 95-473, 92 Stat. 1373 (1978) (revising and codifying Interstate Commerce

Pursuant to § 10729 and its implementing regulations,[4] BN and Santa Fe filed shortly thereafter, on June 3, 1977, a notice of intent to establish a "capital incentive rate" applicable to coal traffic from Cordero to Smithers Lake. The notice proposed a rate of $15.60 per net ton, subject to an annual escalation provision, and an alternative rate of $16.54 per net ton subject only to general rate increases approved by the ICC. The rates would apply only to unit-train movements in shipper-supplied cars, and were subject to a minimum annual volume of four million tons. No separate rate for shipment in carrier-supplied cars was proposed.

The railroads accompanied their notice of intent with affidavits asserting that the movement of HL&P's coal traffic would require a total capital investment of more than $1,000,000. BN asserted that investments in new locomotives and related equipment necessary to move four million tons of coal annually would exceed $27,000,000, and that improvements in, and increased maintenance of, track structure (roadway) attributable to the coal traffic would substantially exceed $1,000,000. Santa Fe stated that, in addition to investment in track structure, its investment in locomotives and related equipment would exceed $9,000,000.

HL&P filed a protest to the proposed rate schedules, and the case was considered on written submissions.[5] In a November 28, 1977, decision, the Commission found that investment in new locomotives and in upgrading roadway and other plant qualified the proposed rate

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Act § 15(1), 49 U.S.C. § 15(1) (1976). Technically, HL&P challenged an existing "paper rate"—*i.e.*, a rate at which no traffic moved—of $40.00 per ton. This complaint case was dismissed as moot by the Commission following its decision on the capital incentive rate filing.

[4] 49 C.F.R. § 1109.20 (1978).

[5] *Id.*, § 1109.20(e).

for treatment under § 10729. It further concluded that the rate of $15.60 per net ton was just and reasonable. However, it rejected the escalation formula to which the $15.60 rate was attached, as well as the proposed $16.54 flat rate.[6]

Arizona Electric Power Cooperative (AEPC), the petitioner in No. 77-2071, is a non-profit, rural electric cooperative which engages in the production and wholesale distribution of electricity throughout the state of Arizona. It has commenced construction at its Apache Station near Cochise, Arizona, of two coal-fired electric generating units that will consume one million tons of bituminous coal annually. AEPC secured its long-term coal supplies from mines near Gallup, New Mexico. This coal will move by railroad over a 523 mile route—371 miles via the lines of Santa Fe from Gallup to Deming, New Mexico; and 152 on the lines of the Southern Pacific from Deming to Cochise.

As in HL&P's case, negotiations for the publication of a tariff agreeable to both the utility and the carriers proved unavailing. By complaint filed January 19, 1977, AEPC sought prescription by the Commission of the just and reasonable rate for the coal traffic. During the pendency of the complaint proceedings, Santa Fe and Southern Pacific filed a notice of intent to establish a capital incentive rate of $8.64 per net ton for coal traffic from Gallup to Cochise. The proposed rate applied to unit-train shipments in shipper-supplied cars, subject to a minimum of one million tons per year.

By accompanying affidavit, Santa Fe asserted that the new coal traffic would require an investment of at least $3,000,000 for new locomotives and $2.41 million for construction and upgrading of track structure.

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[6] No. 36608, *Incentive Rate on Coal—Cordero, Wyoming to Smithers Lake, Texas* (served Nov. 30, 1977).

Southern Pacific alleged a required investment exceeding $2,000,000 for new locomotives and related equipment.

Over protest by AEPC, the Commission held on November 28, 1977, that the railroads' proposed investment in locomotives and roadway satisfied the requirements for treatment under § 10729, and that the $8.64 rate was just and reasonable.[7]

The utilities filed petitions for review. The railroads intervened on behalf of the ICC. The United States, a statutory respondent, takes no position in this controversy.

II. ICC Jurisdiction Under § 10729

We first consider petitioners' threshold argument that the Commission erred in its determination that the railroads' claimed investment in locomotives and roadway improvements qualified their proposed rate schedules for consideration under § 10729, and for its five-year preclusion of attack.

A. *The Congressional Intent*

The issue is whether, as petitioners contend, Congress intended to limit § 10729's special procedures and protections to rates that reflected investment in new or innovative types of rail facilities, equipment or services. In petitioners' view, the section does not extend to rates based on more conventional investments, such as for locomotives and roadway, merely necessitated by new or increased traffic. As originally enacted, the provision could be invoked "whenever the implementation of the proposed schedule would require a total capital investment of $1,000,000 or more." [8] Its 1978 codification, as § 10729,

[7] No. 36612, *Incentive Rate on Coal—Gallup, New Mexico to Cochise, Arizona* (served Nov. 28, 1977).

[8] Interstate Commerce Act § 15(19), 49 U.S.C. § 15(19) (1976) (revised and codified as 49 U.S.C. § 10729 by Pub. L. No. 95-473, 92 Stat. 1389 (1978)).

provides that it applies to rates "requiring a total capital investment of at least $1,000,000 to implement." [9] Obviously, the language makes no reference to innovation.

What petitioners point to is the section's genesis as a reaction to the difficulties encountered by the Southern Railway in its efforts to publish new, lower rates for the shipment of grain in the large-capacity, aluminum "Big John" cars that it had developed at a cost of $13,000,000.[10] They glean from the legislative history various bits of support.

A concern that regulatory obstacles were stifling technical innovations in the railroad industry by discouraging investment clearly informed Congress in its enactment of a capital incentive rate provision. But in enacting the capital incentive rate provision Congress did not limit itself to that concern.

Bills addressed to the deteriorating financial condition of the railroad industry were introduced in two successive Congresses. In the 93rd Congress, the Department of Transportation sponsored a Transportation Improvements Act that included a section closely resembling the capital incentive provision ultimately enacted, save that it established a threshold of $500,000.[11] The provision

[9] 49 U.S.C. § 10729(a), quoted in full in note 2 *supra*.

[10] *See* Grain in Multiple-Car Shipments—River Crossings to the South, 318 I.C.C. 641 (Division 2), *reversed*, 321 I.C.C. 582 (1963) (Full Commission), *reversed sub nom.* Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F.Supp. 572 (S.D. Ohio 1964), *vacated per curiam sub nom.* Arrow Transport Co. v. Cincinnati, N.O. & T.P. Ry. Co., 379 U.S. 642, *on remand*, 325 I.C.C. 752 (1965).

[11] H.R. 12891, § 5, 93rd Cong., 2d sess. (1974), *reprinted in Surface Transportation Legislation: Hearings before the House Comm. on Interstate and Foreign Commerce and the Subcomm. on Transportation and Aeronautics*, 93rd Cong., 2d sess. 20-21 (1974).

contained no language limiting it to "new" or "innovative" types of service. But Secretary of Transportation Brinegar, testifying on behalf of the bill before a subcommittee of the House Committee on Interstate and Foreign Commerce, implied such a limitation. He explained the purpose of the capital incentive provision:

> to reduce the delay and uncertainty associated with the introduction of new services, and thereby to encourage experimentation and the introduction of service innovations.[12]

The Committee evidently adopted the Secretary's view of the purpose of the capital incentive provision. The bill it reported, the Surface Transportation Act, contained a capital incentive provision applicable to proposed rate schedules "whenever the implementation of the proposed rate schedule *would result in a new type of service for the shipper* requiring a total capital investment of $1,000,000 or more." [13] The Committee's report emphasized that the section was to apply where "the service to be offered is genuinely innovative in character." [14] While this bill passed the House, it died in the Senate.

The 94th Congress again addressed, and eventually acted upon, the plight of the railroads. In the House, the Department of Transportation sponsored a bill containing a capital incentive provision essentially identical to the one in the Transportation Improvements Act it had proposed to the 93rd Congress.[15] The Department did

[12] *Surface Transportation Legislation Hearings, supra* note 11, at 279.

[13] H.R. 5385, § 307, 93rd Cong., 2d sess. (1974), *reprinted in* H.R. REP. No. 93-1381, 93rd Cong., 2d sess. 10 (1974) (emphasis supplied).

[14] H.R. REP. No. 93-1381, *supra* note 13, at 28; *see also* 120 CONG. REC. 38,736 (1974) (remarks of Rep. Adams).

[15] H.R. 7681, § 5(a), 94th Cong., 1st sess. (1974), *reprinted in Railroad Revitalization: Hearings Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st sess. 49-50 (1975).

not propose limiting language but it again asserted that the provision was directed to the problem that "[t]ime, expense, delay and uncertainty associated with the regulatory process have . . . discourage[d] experimentation and the introduction of service innovations." [16] Congressman Adams introduced another bill containing a capital incentive provision identical to the one adopted by the House the preceding session—including the express reference to new types of service.[17] The bill ultimately reported by the Committee on Interstate and Foreign Commerce contained a capital incentive provision that followed the language of the provision in the Department of Transportation bill, with no reference to innovative service.[18] This bill provided the essence of the provision enacted into law.

At bottom, petitioners argue that because Congress ultimately adopted the Department of Transportation formulation, it embraced the Department's conception limiting the provision as applicable only to new or innovative types of service, despite the absence of express language to that effect. But just such a limitation was reported and approved by the House in the 93rd Congress, and was in the bill introduced by Congressman Adams in the 94th Congress. In this setting we discern that the House made a deliberate choice to give the provision a greater scope than that suggested by the "innovative" limiting language. In contrast to the provision approved by the House in the 93rd Congress, with emphasis on services that were "genuinely innovative in character,"

[16] *Railroad Revitalization Hearings, supra* note 15, at 158.

[17] H.R. 6351, § 306, 94th Cong., 1st sess. (1975), *reprinted in Railroad Revitalization Hearings, supra* note 15 at 23-35.

[18] H.R. 10979, § 303, 94th Cong., 1st sess. (1975), *reprinted in* H.R. REP. No. 94-725, 94th Cong., 1st sess. 14 (1975).

the House Committee in the 94th Congress noted "the need for innovation *and modernization* within the railroad industry." [19] By referring to "modernization," the Committee clearly contemplated that investments for purposes other than innovation would come within the capital incentive provision.

The capital incentive provision originally passed by the Senate differed somewhat from the House version that ultimately prevailed.[20] But it contained no limitation to innovative service. Explaining its provision, the Senate Commerce Committee stated that the provision would apply "in all instances where the carrier's plans can be properly verified." [21]

To give § 10729 its natural meaning is entirely consistent with, indeed advances, Congress's broad objective in enacting the Reform Act. Responding to the grave financial difficulties encountered in recent years by many of the nation's railroads, and perceiving that regulatory obstacles had contributed to these difficulties,[22] Congress enunciated the purpose

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system . . . through ratemaking and regulatory reform.[23]

[19] H.R. REP. No. 94-725, *supra* note 18, at 72 (emphasis supplied).

[20] S. 2718, § 107, 94th Cong., 1st sess. (1975), *reprinted in* S. REP. No. 94-499, 94th Cong., 1st sess. 218 (1975) (section applies "if the implementation of such schedule is contingent upon a total capital investment . . . in the amount of $1,000,000 or more").

[21] S. REP. No. 94-499, *supra* note 20, at 52.

[22] *Id.* at 15-17; H.R. REP. No. 94-725, *supra* note 18, at 53-55.

[23] Reform Act, § 101(a), 45 U.S.C. § 801(a) (1976).

The Commission's interpretation of § 10729 is consonant with that purpose, on the basis of encouragement of investment necessary to meet the needs of new traffic—such as the massive longhaul coal movements at issue here—by assuring expeditious consideration of rates for that traffic and by guaranteeing their stability for a fixed period.

Petitioners protest that § 10729 cannot apply to types of investment which railroads have historically made in order to fulfill their obligations as common carriers.[24] The mere fact that a railroad has a common carrier obligation for new traffic, assuming that exists here, does not mean that § 10729 is redundant or superfluous. Even where legally obligated, a railroad in financial straits may face difficulty in raising necessary funds unless it has some assurance that it will receive a compensatory rate and that the rate will remain stable. And there is always a zone of discretion as to the timing of plans to carry out an obligation. A provision like § 10729 may spur a carrier to the earlier point in that zone.

B. *Requirement of a "Nexus"*

Petitioners make a related argument that § 10729 requires a "nexus" between the proposed investment and the specific traffic to which the new rate will apply. They point to a "nexus" requirement in an ICC opinion accompanying regulations establishing procedures under § 10729,[25] and contend that investments in locomotives

[24] *E.g.*, 49 U.S.C. § 11101(a), Pub. L. No. 95-473, 92 Stat. 1419 (1978) (revising and codifying Interstate Commerce Act, § 1(4), 49 U.S.C. § 1(4) (1976) (duty to "provide the transportation or service on reasonable request")); 49 U.S.C. § 11121(a), Pub. L. No. 95-473, 92 Stat. 1421 (1978) (revising and codifying Interstate Commerce Act, § 1(11), 49 U.S.C. § 1(11) (1976) (duty to "furnish safe and adequate car service")); Private Cars, 50 I.C.C. 652, 671 (1918).

[25] Rate Incentives for Capital Investment, 353 I.C.C. 754 (1977).

and roadway cannot satisfy it. However, the ICC's interpretation of § 10729 does not embody a premise that the section applies only to new or innovative types of service. Its opinion does not say so. Invoking the congressional purposes discussed above, the Commission expressly observed that the capital incentive provision would apply to investment for the purpose of "attracting new traffic" as well as for the purpose of "promoting innovative or improved service." [26] What the Commission did recognize was that "systemwide rate modification predicated upon major investment affecting traffic generally was not contemplated as within the scope" of the capital incentive provision. It is only in this context, of distinguishing a systemwide modification affecting traffic only generally, that the ICC required a "nexus"—defined as a "reasonably direct" or "identifiable" effect of the capital investment upon the transportation service to which the proposed rate schedule would apply.[27]

That definition and purpose of "nexus" is satisfied in the case at hand. Petitioners argue that even the ICC's approach cannot extend to expenditures for locomotives and related equipment. As for these investments there can be no "nexus" because locomotives are not "dedicated" to specific traffic, but rather are assigned to locomotive pools from which locomotives for all of the carrier's operations are drawn. The Commission rejected any dedication requirement, concluding that investment in locomotives would qualify so long as there is "a showing that the additional locomotive power is needed for the new service." HL&P J.A. at 47; AEPC J.A. at 58. The Commission's decision on this point is reasonable, and consistent with the statute and the Commission's own interpretation. It is reasonable to say that demonstration of a direct causal relationship between large volumes of new traffic and the necessity for additional equipment to

[26] *Id.* at 758.

[27] *Id.* at 758, 759.

move that traffic is sufficient to satisfy a requirement of "identifiable effect."

Roadway expenditures, it is argued, lack the requisite nexus because such improvements benefit all traffic moving along the line, not just the specific traffic for which the new rate is proposed. The Commission did recognize in its initial interpretation of the capital incentive section that investments can not ordinarily qualify for capital incentive treatment when their only purpose is to maintain or to restore the condition of lines serving many shippers.[28] In the proceedings now before the court, the Commission concluded that a different situation obtains when it is demonstrated that the roadway upgrading and improvements are necessary to serve safely the increased traffic volume created by unit-train coal shipment. Such investments could qualify even though they would benefit other shippers using the line. HL&P J.A. at 48-49; AEPC J.A. at 59-60. Here, as in the case of locomotive expenditures, we sustain the Commission's conclusion that such a causal relationship between the new traffic and proposed investment satisfies the nexus requirement, and that a "direct" or "identifiable" effect on specific traffic can be found when that traffic requires roadway upgrading. This approach is reasonable and in accordance with the legislature's objective.

C. *Requirement of "Agreement"*

Petitioners also argue that agreement between the shipper and the railroad on the proposed rate for the new traffic is a prerequisite to consideration under § 10729. At least for investments made entirely by railroads, there is no basis for this contention. Nothing in the statute suggests such a requirement. Though the Commission has emphasized that for § 10729 to achieve its purpose, railroads, shippers and others "must work

[28] *Id.* at 758.

closely together to reach mutually beneficial solutions,"[29] its regulations do not prescribe agreement as a prerequisite.[30]

D. *Evidentiary Support for Commission Findings of Qualification*

There is plainly requisite evidentiary support for the Commission's determination in each case that the railroads had demonstrated that implementation of the new service would require an investment of $1,000,000 or more. In HL&P's case, the railroads presented evidence that they would have to purchase 69 new locomotives and an additional number of cabooses because of the new service. HL&P does not dispute the need for locomotive expenditures, but questions the Commission's failure to quantify the exact amount that would be attributable to the proposed coal traffic. The Commission concluded that, in light of the magnitude of the coal movements at issue, "in view of the cost of locomotives (in excess of $500,000) and the large number involved here, the threshold requirement of $1 million is clearly met." HL&P J.A. at 47-48. This approach is reasonable, and the locomotive expenditures in themselves constitute substantial evidence supporting the Commission's finding that § 10729 was properly invoked.

[29] *Id.* at 780.

[30] A different result may obtain where the qualifying investment is made in whole or in part by the shipper. Outside investment would obviously be discouraged if shippers could not rely on rate assurances received from railroads. The Commission has proposed amendments to its current regulations to incorporate a requirement of good faith negotiations where the shipper has invested $1,000,000 or more. We do not, of course, comment on the proposed regulations, but we do note that the Commission views the negotiation requirement as applying only "where both the railroad and a shipper made qualifying investments." 43 Fed. Reg. 23,062 (1978).

AEPC offered evidence that the railroads had available sufficient locomotives to move its coal traffic, and therefore had no need to make their proposed expenditures for eight locomotives. In the face of conflicting evidence in the record, it is not this court's function to weigh again the evidence carefully considered by the Commission.[31] The Commission was entitled to credit the railroads' evidence as to the need for locomotives, and to do so in the context of its observation that coal shipments of the magnitude involved in the AEPC case normally require additional equipment.

E. *Scope of Commission Consideration*

We close this section of the opinion by taking account of the concerns that seem to underlie the vigorous efforts of petitioning shippers to restrict the scope of § 10729 and to rebut the railroads' evidentiary showing under the $1,000,000 threshold requirement. Petitioners fear that treatment of a rate under § 10729 will deprive shippers of their protections under the Interstate Commerce Act. In their view, § 10729 requires only a cursory examination, under truncated procedures, by the ICC of the lawfulness of a proposed capital incentive rate, while it provides an extraordinary protection from further challenge for five years. Counsel for the Commission fuels this concern by the comment that "Congress necessarily contemplated no more than a summary assessment by the Commission of the various factors that go into the concept of 'lawfulness' of a rate schedule." ICC Brief at 14.

Congress permitted the Commission to dispense with some technical procedural formalities in the interest of

[31] *See* Consolo v. FMC, 383 U.S. 607, 620 (1966); Environmental Defense Fund v. EPA, 179 U.S.App.D.C. 43, 48, 548 F.2d 998, 1003 (1976); Salem Trans. Co. v. United States, 285 F.Supp. 322, 324 (S.D.N.Y. 1968) (three judge court) (Friendly, J.).

expedition,[32] but this does not bestow power to dispose cavalierly of challenges to the lawfulness of the proposed rule. Taking into account the significance of the five-year immunity from ICC reconsideration, the requirement of expedition in the consideration of proposed rates does not grant permission to withhold fair and realistic consideration of rates; it is rather a direction to conduct such consideration as a first order of business, and without dawdling. An agency can get to the heart of a matter without undue formality in procedure, such as has often been ascribed, rightly or wrongly, to the ICC. Yet Congress in § 10729 incorporated by reference the substantive regulatory provisions of the Interstate Commerce Act as a whole.[33] Congress further provided that upon protest by an interested party, the Commission was to conduct a proceeding to determine compliance of the new rate with the terms of the Act.[34] The Act retains the requirement of meaningful consideration of the factors that are material in appraising legality of proposed rates; it permits expedition and procedures that move briskly to the heart of the matter.[35]

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[32] 49 U.S.C. § 10729(c) (Commission may act "without allowing an interested party to file an answer or other formal pleading"); *compare* Interstate Commerce Act, § 15(19), 49 U.S.C. § 15(19) (1976) (§ 10729's predecessor) ("hearing may be conducted without answer or formal pleading").

[33] *Id.* § 10729(b).

[34] *Id.* § 10729(c).

[35] *Cf.* Marine Space Enclosures, Inc. v. FMC, 137 U.S.App. D.C. 9, 14-19, 420 F.2d 577, 582-87 (1969) (because of presence of serious anti-trust questions, hearing was required; petitioners were not obligated to develop in detail controversial factual issues when under 12-day deadline).

The scope of § 10729 is illuminated by contrasting it with § 10707 of 49 U.S.C.,[36] another codified provision initially added by the Reform Act. Section 10707 modifies the procedures applicable to the filing of new rates by railroads and governs all new rate filings to which § 10729 does not apply. Like § 10729, § 10707 imposes deadlines on the Commission: a decision on the lawfulness of a new rate must be reached within seven months, with a three-month extension permitted upon a report to Congress explaining the reasons for the delay. Suspension is permitted for seven months, or, if a report is made to Congress, for ten months. If the Commission fails to meet the deadline, the rate (if suspended) goes into effect, with no provision for refund. The rate may be set aside, however, if the Commission subsequently finds it to be unlawful.

Under § 10707 the Commission has discretion to dispense with formalized procedures (permitting the Commission to conduct its hearing "without answer or other formal pleading")[37] identical to that provided by § 10729. Yet whereas § 10707 makes a hearing following protest discretionary, it is significant that § 10729 provides that

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[36] Pub. L. No. 95-473, 92 Stat. 1380 (1978) (revising and codifying Interstate Commerce Act, § 15(8), 49 U.S.C. § 15(8) (1976)).

[37] The recent codification, *see* note 2 *supra*, has muddied somewhat the applicability of the modified hearing procedures contained in § 10707, which apparently seems to say that the Commission's decision to act "without answer or other formal pleading" by an interested party applies only to "its decision to begin the proceeding." No such limitation, if that it be, appears in § 10729. Nor does it appear in § 10707's predecessor, § 15(8) of the Interstate Commerce Act, 49 U.S.C. § 15(8) (1976). In language identical to that of § 10729's predecessor, § 15(19) of the Act, 49 U.S.C. § 15(19) (1976), § 15(8) provides that where the Commission initiates a hearing, the hearing "may be conducted without answer or other formal pleading."

the Commission *shall* conduct a hearing upon protest by an interested party.

Both sections reflect a congressional purpose to speed needed revenues to the railroads by reducing the delay that previously characterized the Commission's rate decisions. Both sections require a prompt Commission response, but in both sections Congress intended to work no change in substantive standards. These are to be applied with expedited procedures under provisions similar for both sections. The stricter hearing requirement in the section according an extraordinary benefit (§ 10729) reinforces the continuing duty of the Commission to give due and fair consideration to the factors material in determining lawfulness of a proposed capital incentive rate.[38]

[38] Although its counsel now suggests otherwise, the Commission itself has recognized that § 10729 requires full consideration:

> Nothing in section 15(19) [§ 10729's predecessor] purports to change substantively the traditional criteria by which determinations of unlawfulness are made. We perceive no fundamental inconsistency between the policies underlying section 15(19) and other sections of the Interstate Commerce Act.... The point is that the section preserves existing safeguards . . . since a meaningful investigation of the lawfulness of a proposed schedule must be conducted upon request.

Rate Incentives, supra note 25, at 763-64. The Commission has proposed amendments to its current regulations implementing § 10729, 49 C.F.R. § 1109.20 (1978), that would require railroads to demonstrate that their proposed investments qualified under § 10729 prior to filing the notice of intent to establish a capital incentive rate. The purpose of this modification is to enable the Commission to carry out more effectively during the 180 days its primary function of assessing the lawfulness of the proposed rates. 43 Fed. Reg. 22,062 (1978).

III. ICC Determinations of Lawfulness of Proposed Rates

A. *Reviewability and Scope of Review*

Before turning to the Commission's determinations as to the lawfulness of the proposed capital incentive rates, we are confronted with a question of the scope of review of the Commission's orders on this point.

Intervenor railroads point to § 10729(b), which permits a capital incentive rate to become effective unless the Commission decides within 180 days after the filing of a notice of intent that the proposed rate would violate the Interstate Commerce Act. Once the rate becomes effective, "the Commission may not, for 5 years, suspend or set it aside as violating" the substantive regulatory provisions of the Act. In intervenors' view, this language deprives the Commission of authority to find a capital incentive rate unlawful and to set it aside even when a reviewing court has remanded the Commission's initial decision approving the rate because of defects under the Administrative Procedure Act.

To deny the Commission authority to correct its errors on remand is effectively to negate judicial review of the Commission's substantive determinations.[39] If a court may not, on finding legal error, remand to the Commission to reconsider its conclusion that the incentive rate is unlawful, then judicial review is an idle ceremony.[40] In-

[39] There is no dispute that the Commission's decisions as to the qualification of any proposed investment for treatment under § 10729 are reviewable.

[40] *Cf.* Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 819 (1973), *quoting* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1942) ("If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the

deed, it is worse than no review, for it provides the trapping of judicial affirmance when there is no meaningful judicial consideration.[41]

We have considered whether in this instance there exists the "clear and convincing evidence" necessary to a conclusion that Congress intended to restrict such review. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 141 (1967). Congress has on occasion forbade judicial review of the validity of agency determinations (except for constitutional issues) and when such an intent is articulated the courts will respect it.[42]

While there is a rudimentary logic in the contention of intervenor railroads, we do not discern either in the framework, text or legislative history of this statute the indicia of such a legislative intent. In our view, what the statute means is that the Commission has no authority to provide agency-generated reconsideration of its approval of a rate—whether the approval is expressed positively, in an order, or passively, by failure to intercede. But when a court holds that agency approval is infirm, it may provide, as an incident to judicial review, for agency reconsideration. Thus, in *International Harvester Co. v. Ruckelshaus*, 155 U.S.App.D.C. 411, 446, 478 F.2d 615, 650 (1973), we concluded that a requirement that the Administrator of EPA enter within 60 days

courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made").

[41] *See* Public Service Comm'n. v. FPC, 167 U.S.App.D.C. 100, 116, 511 F.2d 338, 354 (1975) (when legislature prescribes system of "regulation by an agency subject to court review the courts may not abandon their responsibility by acquiescing in a charade or a rubber stamping of nonregulation in agency trappings").

[42] *E.g.*, Midwestern Gas Transmission Co. v. FERC, —— U.S.App.D.C. ——, ——, 589 F.2d 603, 625-26 (1978).

a decision on automobile manufacturers' petitions for suspension of emission standards did not preclude further EPA consideration on remand.

There is no significant legislative history on the issue.[43] The legislative understanding that we have discerned finds support in the Reform Act's structuring of § 10729

[43] The bill reported by the House Committee on Interstate and Foreign Commerce in the 93rd Congress, which was passed by the House but died in the Senate, did contain the following subsection as part of its capital incentive provision:

> Failure of the Commission to hold a hearing . . . shall be considered agency action and shall be reviewable as such in accordance with chapter 7 of title 5, United States Code. The court may, in an action brought under such chapter 7, order the Commission to hold a hearing . . . . If the Commission is so ordered, it shall hold such a hearing, and if it makes the determination that the proposed schedule, or any part thereof, would be unlawful, it shall suspend the schedule even if such suspension is after [the approval period].

H.R. 5385, § 307, *reprinted in* H.R. Rep. No. 93-1381, *supra* note 13, at 10. The accompanying Committee Report contains no comment upon this section. But its inclusion might reflect a congressional understanding that judicial review was to extend only to the failure to hold the hearing mandated by the capital incentive provision. In that circumstance only could a rate be suspended for unlawfulness notwithstanding the expiration of the approval period. On the other hand, the section may have signified nothing more than a congressional intent to assure in this context the reviewability of Commission decisions not to investigate a proposed rate, a matter that as a general proposition has only very recently been resolved. *See* Southern Ry. Co. v. Seaboard Allied Milling Corp., 47 U.S.L.W. 4701 (U.S. June 11, 1979) (holding ICC decision not to investigate nonreviewable); Asphalt Roofing Mfg. Ass'n. v. ICC, 186 U.S.App.D.C. 1, 8-9, 567 F.2d 994, 1001-02 (1977). On balance, we attach little significance to this provision, because of its omission from the Reform Act as ultimately enacted, and because of the absence of congressional explanation of its purpose.

as a pre-filing review procedure. Section 10707, which governs all new rate filings by railroads that do not qualify under § 10729, defines the circumstances under which the Commission may "suspend" a rate pending determination of its legality, or "set aside" a rate filing that has become effective but which the Commission subsequently finds unlawful. Section 10729 establishes an alternate procedure for capital incentive rates. Under that section, the Commission must pass on the rate before it may be filed, though the standards it applies are identical. Once the rate is filed and becomes effective, the Commission may not "suspend" it or "set it aside". This structuring of § 10729 as a pre-filing procedure and the complementary language of the two sections strongly indicate that what Congress had in mind in enacting § 10729 was to preclude recourse by opponents of a rate filing to the conventional procedures of § 10707 after the capital incentive rate was filed.[44] While Congress clearly intended to prevent the Commission from reopening the merits of a capital incentive rate, we find nothing suggesting that it envisioned that the initial decision approving the rate and immunizing it from further ICC consideration, would also immunize the rate from judicial review for arbitrariness or departure from specific legal requirements.

Intervenors suggest that Congress realized that extended judicial proceedings, like protracted litigation before the Commission, would inhibit investment because

[44] Congress also presumably intended to preclude a challenge to the reasonability of an established rate by means of a complaint pursuant to 49 U.S.C. § 11701, Pub. L. No. 95-473, 92 Stat. 1449 (1978) (revising and codifying Interstate Commerce Act, § 13(1), 49 U.S.C. § 13(1) (1976)), and prescription of a just and reasonable rate pursuant to 49 U.S.C. § 10704, Pub. L. No. 59-473, 92 Stat. 1373 (1978) (revising and codifying Interstate Commerce Act, § 15(1), 49 U.S.C. § 15(1) (1976)).

such proceedings would contribute to uncertainty about the legality of proposed rates. The dominant chord of Congress's actions in the Reform Act is the need to remedy delay by the Commission.[45] Thus, even the Senate Report cited by intervenors identifies this as the concern underlying § 10729: "large-scale initiatives may be thwarted by delays in the exercise of the Commission's ratemaking powers." [46] There was no explicit mention of delays in the courts.

Nor does judicial review portend the practical impact intervenors fear. The direction to the agency to provide expedition will be taken to heart by the courts, as an indication of legislative policy. *See International Harvester*, *supra*, 155 U.S.App.D.C. at 425-28, 478 F.2d at 629-32. Furthermore, courts apply a deferential standard in judging rate determinations. As summarized by Mr. Justice Marshall:

> Such decisions "are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481 (1918). As this Court has observed, "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has

[45] *See* S. REP. No. 94-499, *supra* note 20, at 15:

> Not only is there a need to change the substantive standards by which the Commission regulates railroads, but to improve the regulatory process. There are presently grave limitations upon the ability of the Commission to properly perform its regulatory functions. . . . These all add up to excessive regulatory delay and erode the confidence of the public in needed regulation.

[46] *Id.* at 52.

> charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942).

Atchison, T. & S.F. Ry. v. Witchita Board of Trade, 412 U.S. 800, 806 (1973) (plurality opinion). The congressional interest in encouraging large-scale investments by minimizing regulatory uncertainty, coupled with sensivity to the time pressure under which the Commission must operate in capital incentive proceedings, suggest that this standard be applied with an extra dollop of deference. While modification of the formulation of the standard is not necessarily called for, our review will be directed primarily at ascertaining that the Commission's decision reflects meaningful consideration of the salient factors and comports with applicable law.

B. *Reasonableness of Proposed Rates*

In concluding that the rates proposed in each proceeding were just and reasonable, the Commission considered several factors: rates prevailing on movements of comparable traffic, and costs incurred by the carrier in providing the service, the need of the railroads to attract equity capital and the value of service to shippers. Bearing in mind that determinations of the reasonableness of rates are primarily the province of the agency charged with that assessment, we find the Commission's determinations to reflect full consideration of the evidence and the salient factors.

1. *Comparable Rates*

The parties in each proceeding adduced conflicting evidence as to the rates, measured in mills per ton/mile, prevailing on comparable traffic. The Commission, in the main, credited the railroads' evidence and rejected the comparable rates offered by the utilities as outdated,

and as not reflecting the impact of inflation and the increased value of service of coal traffic in light of the current energy situation. HL&P, in essence, takes issue with the Commission's conclusion as contrary to the weight of the evidence. AEPC argues, in addition, that the Commission's determination in its case is plainly wrong because the allegedly comparable rates offered by the carriers applied to single car, and not unit-train service. Railroad counsel at oral argument responded to this contention by asserting that the movements relied upon by the Commission were in fact volume movements of coal, with costs that are perhaps not as low, but within the same range, as unit train movements.

This latter dispute illustrates that this court is hardly equipped to exercise its judgment in assessing the evidence in place of the expertise of the Commission. We therefore find no basis on which to overturn the Commission's determinations. We do note that in any event, the Commission was careful to limit the significance of its comparable rate determinations, denominating such evidence only one indicium (and not a conclusive one) of the reasonableness of rates. *See* HL&P J.A. at 54; AEPC J.A. at 61-63.

2. *Cost Evidence*

As to HL&P's coal traffic, the Commission determined the railroads' variable costs to be $9.59 per net ton, and their fully allocated costs to be $12.86 per net ton. The Commission concluded that a rate of $15.60 per net ton, which would recover 163 per cent of variable costs and 121 per cent of fully allocated costs, came within the "zone of reasonableness," though it fell on the high end of the range. The Commission rejected, however, a rate of $16.54 as exceeding a maximum reasonable level. HL&P J.A. at 54-59. As to AEPC's traffic, the Commission found variable costs of $5.44 per net ton, and fully allocated

costs of $6.94. It found just and reasonable the proposed rate of $8.64 per net ton, which recovered 159 per cent of variable costs and 124 per cent of fully allocated costs. AEPC J.A. at 63-67.

Petitioners allege numerous errors in the Commission's assessment of the cost evidence. The evaluation of evidence of carrier costs of providing a service is a function peculiarly for agency expertise.[47] We apply our narrow standard of review and conclude that the Commission's cost determinations are supported by substantial evidence.[48]

3. *Need to Attract Equity Capital*

A more difficult question is posed by the Commission's treatment of the need to attract equity capital. The Commission concluded that the need to attract equity capital justified the excess revenues above variable or fully allocated costs that would be generated by the proposed rates. In view of petitioners' objections, the Commission did not incorporate the cost of equity capital directly into its cost calculations. But it did take that factor into ac-

[47] The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

New York v. United States, 331 U.S. 284, 328 (1947). *Accord,* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 589-90 (1945); National Ass'n of Greeting Card Publishers v. USPS [Fourth Postal Ratemaking], No. 78-1448, slip op. at 20-21 (D.C. Cir. June 8, 1979).

[48] AEPC argues that the decision in its case is tainted by the consideration of "prejudicial and erroneous" evidence that was introduced by the railroads in the contemporaneous complaint proceeding instituted by AEPC. We agree with the Commission's conclusion that since the parties and factual issues in both proceedings were the same, AEPC could not have been prejudiced by consideration of the evidence adduced in the complaint proceeding. *See* AEPC J.A. at 69.

count. "We are convinced that the consideration of rail need to attract equity investment is appropriate in a capital incentive rate proceeding." HL&P J.A. at 56; *see* AEPC J.A. at 65-67.

The Commission found guidance in another section added to the Interstate Commerce Act by the Reform Act. That section, now revised and codified as 49 U.S.C. § 10704(a)(2),[49] mandates a "continuing effort" by the Commission to "assist [rail] carriers in attaining revenue levels" that are "adequate . . . to cover total operat-

[49] Pub. L. No. 95-473, 92 Stat. 1373 (1978) (revising and codifying Interstate Commerce Act, § 15a(4), 49 U.S.C. § 15a(4) (1976)). It provides:

> (2) The Commission shall maintain standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—
>
> (A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and
>
> (B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

ing expenses . . . plus a reasonable and economic profit or return (or both) on capital employed in the business." The statute goes on to prescribe that such revenue levels should "permit the raising of needed equity capital" and "attract and retain capital in amounts adequate to provide a sound transportation system in the United States."

While it did not prescribe specific standards by which to determine the adequacy of revenue levels—deeming that effort inappropriate in view of the then-pending rulemaking directed to the question [50]—the Commission in both cases felt that consideration of overall revenues was nonetheless desirable in light of the strong congressional policy embodied in § 10704(a)(2). The Commission emphasized the particular importance of this consideration in capital incentive rate proceedings, where the congressional purpose to encourage large-scale investment—with the concomitant need to raise capital—was especially acute. Thus, recovery of revenues in excess of fully allocated costs was justified in these cases. The Commission explained its reasoning (also implicit in the HL&P decision) in its AEPC order: "since much railroad traffic moves at rates below fully allocated costs because of competitive pressures, a railroad must be allowed to set some rates in excess of their full cost level where competition, market conditions and demand permit." AEPC J.A. at 67.

Petitioners assert that the new rule of ratemaking enunciated in § 10704(a)(2) was intended by Congress to apply only where railroads do not have "market domin-

[50] Promulgation of such standards was mandated by the Reform Act, *see* Interstate Commerce Act § 15a(4), 49 U.S.C. § 15a(4) (1976) (superseded), and completed on January 31, 1978. *See* Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels* (Jan. 31, 1978).

ance"—*i.e.*, where the play of competitive forces can be expected to hold rates down without the need for regulatory intervention. Within the zone of market dominance, petitioners argue, Congress intended "continued and unchanged" regulation of rates. HL&P Brief at 59. And, under traditional principles, a carrier's revenue needs had no relevance to the determination of the reasonableness of any individual rate.[51]

Application of the policy of § 10704(a)(2) to the rates at issue in capital incentive rate proceedings represents a permissible exercise of the Commission's ratemaking discretion.

Absence of market dominance deprives the Commission of jurisdiction to find a rate unreasonably high.[52] Nothing in the language, structure or history of the Reform Act suggests that § 10704(a)(2) is limited to situations where market dominance is absent. Indeed, since the Commission's jurisdiction to review rates at all where dominance is not present is limited, Congress must have intended the modification in regulatory approach effected by § 10704(a)(2)'s command to apply primarily where the regulatory regime still prevails, *i.e.*, where market dominance is present. The legislative history is not to the contrary. The House Committee noted: "where effective market competition does not exist, regulation to protect against abuse of market power must be

[51] *E.g.*, Scott County Milling Co., 194 I.C.C. 763, 785 (1933) ("Lack of adequate revenues from operations as a whole affords no reliable measure of the reasonableness of rates . . . on individual commodities"); *see also* Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 592 (1959).

[52] 49 U.S.C. § 10709, Pub. L. No. 95-473, 92 Stat. 1382 (1978) (revising and codifying Interstate Commerce Act, § 1(5)(b)-(c), 49 U.S.C. § 1(5)(b)-(c) (1976); *see generally* Atchison, T. & S.F. Ry. Co. v. ICC [Market Dominance], 188 U.S.App.D.C. 360, 580 F.2d 623 (1978).

and is retained." [53] Obviously, however, the retention of a regulatory regime where abuse of market power is a danger does not preclude congressional modification of the regulatory approach.

The same analysis in effect disposes of AEPC's objection to the Commission's consideration of value of service—the relative inelasticity of demand for the transportation of coal—in determining the reasonableness of the $8.64 rate applicable to AEPC's coal traffic. The Commission concluded that § 10704(a)(2)'s command permits some rates to be set at a level exceeding fully allocated costs in order to compensate for those rates which must be set at less than fully allocated costs to meet competition from other transport modes. This was neither arbitrary nor forbidden by the Act. It is pertinent to the objective of providing an adequate overall level of earnings. If traffic with a high value of service is viewed in isolation it bears a heavy burden. Yet all shippers ultimately benefit when the rail carriers are able to generate revenues needed for survival.

It is not a fatal flaw that some traffic is carried at rates above total cost; the revenues from such traffic when added to revenues from traffic that competition requires be carried at less than full cost (but with some contribution to fixed costs), yield adequate overall revenues. This does not imply that the rail carriers are free to charge whatever the traffic will bear. In this very case, the Commission did put limits on some proposed rates, rejecting the $16.54 rate proposal of the carriers for HL&P's traffic.

Finally, HL&P questions the two "proxy tests" adopted by the Commission as "indicia of revenue need" in the absence of regulations prescribing specific standards for measuring revenue requirements. One proxy employed

[53] H.R. Rep. No. 94-725, *supra* note 18, at 69.

an 11 per cent cost of equity capital in the restated computation of costs. The other seems to add a weighted before-tax rate of return based on a percentage of cost. We acknowledge problems in tracking and understanding the Commission's approach. Several interrelated considerations ease our task. First, there is a judicial disposition to withhold intervention in rate matters when, as here, the complaint is not to the level of return but to the methodology. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1943). The court still has a duty to assure application of reasonable standards. However, the standard of judicial review, which is narrow in general for ratemaking, and which is tightened for incentive ratemaking when agency and court are under constraints of expedition, is pinched to the point of exiguity when what is involved is an agency action under a temporary approach in force only pending completion of a more fully considered proceeding.[54] Although the path of the agency is only dimly discerned, we are not prepared to say it is an abdication from reason.

4. *Public Interest*

The petitioning utilities contend that in focusing on the revenue needs of carriers, the Commission has not taken due account of the public interest, specifically, the interests of consumers who will bear the transportation costs through increased electric rates. The State of

[54] *Cf.* United States v. CAB, 167 U.S.App.D.C. 313, 511 F.2d 1315 (1975) (CAB order approving multilateral capacity reduction agreements among airlines was permissible as interim or emergency response to fuel crisis; but full review on non-emergency basis was required before CAB could approve further agreements); Public Service Comm'n. v. FPC, 151 U.S.App.D.C. 307, 317, 467 F.2d 361, 371 (1972) (FPC orders permitting advance payments by pipelines to producers of natural gas upheld in part because of temporary nature of program).

Texas, as amicus curiae, invokes the interests of the public at large in encouraging conversion to domestic coal as an energy source.

The Reform Act does enunciate a congressional policy "to balance the needs of carriers, shippers and the public." [55] While the Commission's decisions do not address the public interest explicitly, they reflect a permissible balancing of the pertinent interests. In the broad, neither the interest of electric consumers in lower rates nor that of the public in coal conversion dictates that the railroads must receive compensation for their services inadequate to maintain financial soundness. On the other hand, the congressional purpose of preserving and restoring a financially viable rail system does not free the Commission from its obligation to apply the just and reasonable standard so as to prevent rail carriers from extracting monopoly profits beyond the revenue levels necessary to effect those purposes. Again we note the unusual circumstances of these cases, which arose before the Commission had fully developed its revenue guidelines. We do not find warrant for judicial intervention on the ground that the Commission has failed to meet its obligation to balance pertinent interests.[56]

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[55] Reform Act, § 101(b) (1), 45 U.S.C. § 801(b) (1) (1976).

[56] Petitioners' remaining contentions have been accorded full consideration. They merit only brief discussion. HL&P claims the Commission erred in failing to disapprove the carriers' refusal to provide transportation in carrier-supplied cars. The Commission noted the practice of shippers to furnish large capacity cars for unit-train coal shipments, and rejected HL&P's claim on the ground that it had already contracted for such specialized equipment. HL&P J.A. at 60. The issue is substantially controlled by Potomac Electric Power Co. v. United States, 190 U.S.App.D.C. 77, 81-82, 584 F.2d 1058, 1062-63 (1978). The court noted the evidence of record that most unit-train tariffs do not provide for carrier-furnished cars, and observed that "a railroad's obligation to furnish transportation service is defined by what it holds out to the public in its tariffs . . . and the furnishing of transportation under the unit-train tariff in question did not occur until the [cars furnished by the utility] were placed in the possession of the railroad for the line-haul movement." *Id.* 81, 584 F.2d at 1062, *citing* Eastern Cent. Motor Carriers Ass'n. v. Baltimore & O. R., 314 I.C.C. 5, 45-47 (1961), *complaint dismissed sub nom.* Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318, 322-27 (W.D. Mo.), *aff'd,* 379 U.S. 6 (1964) (per curiam). In a similar vein, AEPC contests the failure of the carriers to offer a mileage allowance for shipper-furnished cars. We accept the Commission's reasoning that such an allowance would be unjustified because the $8.64 rate applicable to AEPC's traffic already reflects transportation in shipper-supplied cars. AEPC J.A. at 67-68.

HL&P's and AEPC's claims of undue discrimination, and AEPC's objections to certain tariff items, are without merit. We agree with the reasons stated in the Commission's decisions.

C. *Partial Rejection of Proposed Rates*

HL&P contends that the Commission had no authority to permit the carriers to establish the capital incentive rate schedule when it had found portions of that schedule —the $16.54 flat rate and the escalation provision that accompanied the $15.60 rate—unlawful. In HL&P's view, any proposed capital incentive rate schedule must stand or fall as a whole; while "minor technical deficiencies" may be corrected, any legal defect in the schedule requires that it be rejected in its entirety.

HL&P relies on language formerly in the Act, but dropped by the codification that was intended to work no substantive change.[57] We do not believe § 10729 to be

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[57] Section 10729's predecessor, § 15(19) of the Interstate Commerce Act, 49 U.S.C. § 15(19) (1976), provided in pertinent part:

> Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, *or any part*

so lacking in flexibility as to prohibit the Commission from determining the lawfulness of a rate in a capital incentive rate proceeding, when that rate is encompassed within the initial filing, when the record contains evidence supporting that determination, and when the Commission has given full consideration to the lawfulness of the rate. To hold otherwise would be to mandate pointless, inefficient repetition of the capital incentive proceedings and to impair the congressional purpose of expedition. The language of § 10729, which does not support this technical objection, fairly reflects the legislative purpose. *See Carolina, Clinchfield & Ohio Ry. v. ICC*, —— U.S.App.D.C. ——, 593 F.2d 1305 (1979).

IV. Conclusion

In enacting the Reform Act, Congress struck a balance between the needs of shippers, carriers and the public. One aspect of this balance is § 10729, which strives to encourage investment in needed rail facilities by requiring expedited consideration of incentive rates, and by granting approved rates a 5-year immunity from attack. Congress did not limit the types of investment to which the section would apply, but it also intended no change in the standards by which capital incentive rates would be evaluated. In our view, the Commission has given due consideration in these cases to the relevant factors entering into a determination of reasonableness. Its decisions approving the proposed capital incentive rates are

Affirmed.

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thereof, would be unlawful, such carrier may file the schedule . . . .

(Emphasis supplied.) Section 10729 contains no "any part thereof" language. As to Congress's intent to work no substantive change, see Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-2070

HOUSTON LIGHTING & POWER COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Respondents*

BURLINGTON NORTHERN, INC., *Intervenor*

No. 77-2071

ARIZONA ELECTRIC POWER COOPERATIVE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Respondents*
ATCHISON, TOPEKA AND SANTA FE RY. CO., et al., *Intervenors*

Petitions for Review of Orders of the Interstate Commerce Commission

BEFORE: Bazelon, Leventhal and Robb, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the orders of the Interstate Commerce Commission on review herein are hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
George A. Fisher, Clerk

Date: June 26, 1979
Opinion for the Court filed by Circuit Judge Leventhal.

APPENDIX C

31071

INTERSTATE COMMERCE COMMISSION

No. 36612

INCENTIVE RATE ON COAL—GALLUP, NEW MEXICO TO COCHISE, ARIZONA

Decided November 28, 1977

Proposed capital incentive rate schedule found qualified for consideration under section 15(19) of the Interstate Commerce Act. Proposed rate found lawful.

Robert A. Hewlett, C. Michael Loftus, and *William L. Slover* for protestant.

Charles W. Burkett, Harry L. DeLung, Jr., Harvey Huston, Milton E. Nelson, Jr., Louis P. Warchot, and *Richard E. Weicher* for respondents.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This proceeding is brought under section 15(19) of the Interstate Commerce Act[1] generally in accordance with the procedures set forth in regulations[2] adopted by the Commission in Ex Parte No. 327, *Rate Incentives for Capital Investment,* 353 I.C.C. 760 (1977). Due and timely execution of our functions under section 15(19) of the act imperatively and unavoidably requires the omission of a recommended decision in this proceeding. Requested findings and evidentiary rulings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the appropriate disposition of the proceeding.

On June 1, 1976 respondents, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (Southern Pacific) filed a notice of intent to file schedules containing a capital incentive rate of $864[3] on coal in unit-train service from Gallup, N. Mex., to Cochise, Ariz., subject to shipment of a minimum of 1 million tons per year. The proposed schedule[4] states an alternative per-car rate of $11.81 where the tonnage requirement is not met. The proposed schedule applies only to movements in shipper-supplied cars. The route of movement will be

[1]As revised by section 205 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law No. 94-210 (the 4R Act).

[2]See 49 CFR 1109.20 *et seq.*

[3]Rates and costs are stated per net ton, unless otherwise indicated.

[4]The proposed schedule is set forth in appendix A.

via Santa Fe from Gallup to Deming, N. Mex., and via Southern Pacific from Deming to Cochise, Ariz., for a total distance of 523 miles—371 via the Santa Fe and 152 via the Southern Pacific.

Affadavits accompanying respondents' notice of intent indicate that respondents anticipate that the following capital investments are required to implement the proposed schedules:[5]

	Million
Santa Fe share of locomotives and related equipment	$3+
Construction and upgrading projects (to be undertaken within the first year after institution of the proposed service) by Santa Fe	2.41
Southern Pacific share of locomotives and related equipment	2+

Arizona Electric Power Company (AEPC) of Benson, Ariz., produces and markets electric power to customers throughout the State of Arizona. It is a nonprofit, rural electric cooperative operating pursuant to the Rural Electrification Act of 1936 and the program administered by the Rural Electrification Administration. AEPC is engaged in the construction of two new electric-generating units at its Apache Station located at Cochise, Ariz. The bituminous coal-burning units will cost in excess of $270 million and the first will be completed in early 1978. When both are operational, coal consumption will be approximately 1 million tons per year. Coal supplies have been secured from sources near Gallup, N. Mex., the named origin point in respondents' proposed schedule. That schedule is designed to apply to the movement of AEPC's coal.

AEPC filed a protest to the proposed schedule on July 15, 1977. Pursuant to that protest and its obligations under section 15(19) of the act, the Commission initiated an investigation of the proposed schedule and ordered that the modified procedure set forth in Ex Parte No. 327, *supra,* be followed. Three pleadings were filed—an initial presentation by protestant, respondents' reply statement, and protestant's rebuttal statement.

The parties are in substantial disagreement on four major issues: (1) whether the proposed schedule qualifies for treatment under section 15(19); (2) the proper method for computing the cost of

[5] Respondents subsequently reevaluated the amount of investment required to implement the new service. In their reply statement, they state in excess of $12 million will be required—$4,795,050 for eight locomotives and way cars and $7,967,730 for upgrading roadway on the Santa Fe's line.

service and the weight that should be accorded cost evidence in determining maximum reasonableness of rates; (3) the validity of allegedly comparable rates presented by both parties as a basis for determining maximum reasonable rates; and (4) the lawfulness of other conditions of the proposed tariff, including switching charges, volume requirements, and respondent's failure to offer service in carrier-supplied cars.

Positions of the Parties

Does the proposed schedule qualify for treatment under section 15(19)?—Protestant believes that no capital investment is "required" to implement the proposed schedule as that term is used in section 15(19). Protestant asserts that respondents' claim that they must purchase eight locomotives to implement the new service implies that the new locomotives be dedicated exclusively to the AEPC coal traffic. Only in this way, protestant contends, can the claimed capital investment be directly indentified with the AEPC coal traffic. However, exclusive dedication would, in protestant's view, constitute contract carriage and violate part I of the act.

Protestant offers testimony, based upon a field survey, that locomotives are not dedicated to high-volume unit-train service, but rather are pooled and used on a systemwide basis. In the absence of a connection between particular locomotives and specific trains or traffic increments, the purchase of locomotives would have a uniform effect on all system traffic and lack the requisite "identifiable effect"[6] on protestant's traffic which is a prerequisite for capital incentive treatment under section 15(19). Moreover, protestant argues that the evidence does not support or document the Santa Fe's need to acquire five new locomotives in order to transport AEPC's coal traffic, except inferentially through respondent's inclusion of locomotive costs in its cost evidence. Respondents' 1976 Annual Reports, showing 3,887 locomotives in service and 75 locomotives leased to others, are cited to demonstrate that new locomotives are not required to implement the new service.

In response to respondents' assertion that a $7.9 million capital investment in construction and upgrading projects will be required, protestant has introduced the testimony of two witnesses, both of whom made on-site inspections of the Santa Fe portion of the route

[6] See Ex Parte No. 327, *supra,* at 765.

(between Gallup and Deming, N. Mex.) on which the major portion of the investment is contemplated by respondents. Both witnesses, on the basis of a detailed examination of the proposed construction and upgrading, conclude that while all the proposed improvements suggested by respondents are desirable, none is required (in the form and at the expense proposed) to handle AEPC's unit-trains. Protestant states that the entire line from Gallup, N. Mex., to Cochise, Ariz., is currently handling traffic similar in character to the traffic involved and that the new traffic could move tomorrow. Furthermore, the method by which the cost of these improvements is attributed to AEPC coal traffic is allegedly unexplained and unsupported in the record.

Protestant cites Ex Parte No. 327, *supra,* at 764, where the Commission observed that railroad investment devoted to rebuilding main line served by many shippers could not ordinarily serve as the basis for capital incentive rates, for the proposition that projects of this very kind have been ruled out as qualifying investments. The ineligibility of these improvements is further underscored, in protestant's view, by testimony of one of respondents' witnesses that certain of the improvements will be undertaken after commencement of the AEPC traffic.

In reply, respondents aver that they are required to purchase eight locomotives and waycars in order to handle the AEPC movements and that capital investments of $3,246,000 (Santa Fe) and $1,549,050 (Southern Pacific) for this purpose are directly attributable to the new AEPC traffic. Respondents do not deny protestant's assertion that locomotives purchased will not be exclusively dedicated to the AEPC traffic. However, they point out that under AEPC's theory, no capital investment in rolling stock could qualify for capital incentive rate treatment because AEPC insists that dedication of rolling stock to specific traffic is forbidden by the act. Moreover, respondents argue that the Commission itself recognized in *San Antonio, Tex.* v. *Burlington Northern Inc.*, 355 I.C.C. 405 (1976); affirmed *Burlington Northern* v. *United States*, 555 F. 2d 637 (1977), that new unit-train coal service requires the purchase of new rolling stock by including the cost of additional locomotives and cabooses in its own calculation of the variable cost of moving that traffic.

Respondents perceive AEPC's position as internally inconsistent: on the one hand it desires a customized unit-train operation capable of delivering 1 million tons of coal annually and requiring reliable scheduling commitments, while on the other hand, it denies that

investments which will bring about this service are really necessary. Respondents state that the proposed improvements are necessary to insure that the service rendered AEPC will be safe and adequate.

Respondents have introduced detailed testimony on the proposed capital investments in roadway which assertedly are needed to handle the AEPC traffic. In response to protestant's criticism of original estimates of needed track upgrading contained in respondents' notice of intent, respondents have conducted an on-site inspection and conclude that $7,967,730 (at 1978 price levels or date work was completed) would be required in railroad improvements in order to accommodate the proposed unit-train service. Respondents point out that the Commission has observed that:

> Section 15(19) could apply to upgrading tracks on branch lines, spur tracks, long sidings, or even portions of main line, where the improvements are directly identified with specific traffic and associated with the rate modification or new rate. Ex Parte No. 327, ***Rate Incentives For Capital Investment***, 353 I.C.C. at 765.

In response to AEPC's allegation that capital expenditures would not be undertaken until after the commencement of the new movement, respondents argue that the timing of the investment has no bearing on whether it qualifies for capital inventive treatment. Respondents contend that improvements to roadway, unlike locomotive power, are not necessarily required before the commencement of the new service but will become necessary as the number of movements increases. Thus, respondents agree that AEPC's first shipment might be able to successfully complete the trip with no road improvements, but assert that the heavy-volume movement of coal could not take place for long if these were not made.

Lawfulness of the proposed rate—cost of service.—Protestant has introduced a cost/revenue analysis for the proposed movement performed in accordance with Rail Form A procedures[7] and *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970). Unit costs were developed for the calendar year 1976 and indexed to reflect wage and price levels as of July 1, 1977. Direct costs were substituted in some instances and Rail Form A unit-costs adjusted to reflect traffic and operating characteristics peculiar to the AEPC traffic. The analysis produces a variable cost of service

[7]The parties cost evidence is set out and discussed more fully in appendix B.

figure of $3.31 per net ton ($327.36 per carload) which, in protestant's view, clearly establishes the unlawfulness of the proposed rate of $8.64.

Protestant also introduced territorial revenue/cost ratios based on the most recent rail revenue contribution study[8] and the Commission's coal studies in Ex Parte 270 (Sub-No. 4), *Investigation of Railroad Frt. Rate Structure—Coal,* 345 I.C.C. 71 (1974); 345 I.C.C. 493 (1976). Applying its variable cost to these ratios, AEPC projected appropriate rate levels for the proposed service ranging from $4.10 to $4.67.[9]

Respondents believe that it is inappropriate to base rates solely on costs because individual rates are not necessarily related to costs, either variable or fully allocated. Respondents observe that the Commission has ruled that contributions above variable costs which particular rates should make will vary with demand for, and value of the service provided. Moreover, respondents point out that much railroad traffic must move at rates below fully allocated cost because of competition. Therefore, if a railroad is to earn an overall return which covers its full costs, it must be allowed to set many rates well in excess of their full-cost level where competition, market conditions, and demand permit. For example, respondents point out that, because wheat constitutes such a large portion of the Santa Fe's traffic and because rates on wheat are depressed and moving at little over variable cost because of truck competition, coal must contribute relatively more toward systemwide revenue needs.

Respondents have introduced their own cost study setting variable cost at $6.06 per net ton and fully allocated cost at $8.82, based on the ton/ton mile method. These figures yield a rate-to-variable cost ratio of 1.43 and a rate-to-fully allocated cost of 0.98. In view of other recent Commission decisions upholding coal rates far exceeding those ratios, including *Potomac Electric Power Co.* v. *Penn Central,* 356 I.C.C. 831 I.C.C. (1977), respondents assert that these rate-to-cost ratios are reasonable.

Respondents criticize AEPC's cost evidence as a largely mechanical application of Rail Form A, employing a cost methodology which bears no relation to economic reality. In particular, they allege that protestant, by assuming that capital costs

[8]"Rail Revenue Contribution and Territory for the year 1972", statement No. 153-72.

[9]These are based on alleged ratios of rates to variable cost ranging from 124 to 141 percent.

are equal to embedded debt costs,[10] ignores current costs of debt and equity capital that must be considered in determining the variable cost of providing the proposed service. Respondents themselves used a weighted cost of capital figure of 11 percent—a figure which is allegedly conservative.[11]

Respondents' second major criticism of protestant's cost evidence concerns treatment of the new locomotives and roadway investment which respondents allege are required to handle AEPC's coal traffic. They contend that the costs of such incremental investments, including depreciation and capital costs of the new locomotives and other equipment which will be used in unit-train service should be borne by AEPC—the shipper for whom the investments are made—rather than added to the railroads' systemwide costs to produce slightly higher systemwide averages. The latter approach, advocated by protestant, would allegedly result in other shippers having to bear part of the costs of the new investment required solely to serve AEPC and would be contrary to the decision in ***Burlington Northern, Inc.*** v. ***United States, supra.***[12]

Respondents primary defense of the proposed rates is premised on the new standards for railroad ratemaking set forth in the 4R Act. Respondents cite congressional recognition of the inadequate financial condition of the railroads and state that the principal purpose and effect of the 4R Act is to allow the railroads greater flexibility in setting rates which produce an adequate return and permit the raising of capital. They place particular emphasis on section 205 of the 4R Act which directs that the railroads be permitted to earn "a fair, reasonable, and economic profit or return (or both) on capital employed in the business ***" and that revenue levels should "permit the raising of needed equity capital." Respondents claim that unless these statutory provisions are fully implemented, the railroads will be unable to make the investments in plant and equipment which are necessary to implement the President's National Energy Plan which calls for the ready availability of huge volumes of coal and railroad facilities to haul that coal. They argue that the railroads must raise billions of dollars

[10]See discussion in appendix B.

[11]Respondents rely on Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges,* decided August 1, 1977, for rejecting use of embedded debt costs in determining the variable cost of service. In the context of that proceeding, the Commission recognized that linking a fair rate of return to the debt/interest rate was inappropriate in computation of basic per diem accounting.

[12]In discussing proper treatment of incremental costs, the Court noted that the purpose of the 4R Act cannot be met unless rates for a large unit-train movement are structured to "stand on their own wheels." *Id.* at 647.

for new capital investments over the next decade for plant and railroad equipment and a significant portion of that capital is required by the increasing use of coal as an energy source.

Respondents offer voluminous testimony on the financial condition of the railroad industry in general and the Santa Fe and Southern Pacific in particular to show that there is need for additional revenues to attract capital so that adequate and efficient railway transportation service will be available in the future. Testimony indicates that the cost of capital to the railroads is far greater than it was 10 or 20 years ago because of inflation, higher interest rates, and increased demand for capital by the Government and other borrowers. In addition, low profitability and consequent risk to investors has so increased the cost of capital that certain markets are virtually foreclosed to the railroads. Numerous recent decisions wherein the Commission has recognized the weak financial position of the industry are cited.

Respondents contend that at present their roads carry very little coal. However, the Santa Fe projects that by 1985, coal will account for up to 20 percent of total tonnage handled and 11 percent of total revenue ton-miles. In the same period, Southern Pacific expects coal volume to grow to 45 to 54 million tons per year. Respondents state that major capital expansion of plant and equipment will be required to enable them to handle the new coal traffic.

Under these circumstances, respondents contend, a cost of capital rate based on the embedded debt cost used by protestant in its cost evidence would condemn the railroads to a future in which they would be unable to attract needed equity capital as contemplated by the 4R Act. In support of the claim, testimony is presented by respondents on the current cost of capital. Respondents have attempted to demonstrate that their cost of capital, including equity capital, is in excess of 11 percent.

Lawfulness of the proposed rate—comparable rates.—Protestant introduced a study of the rates and characteristics of eight allegedly representative coal movements from western origins.[13] The average rate (as of July 15, 1977) on these movements is $5.76, yielding an average revenue of 7.37 mills per ton mile on an average annual volume of 1,190,000 tons over an average distance of 753 miles. Protestant asserts that these figures clearly demonstrate that the proposed rate of $8.64, which would yield revenues of 16.5 mills per

[13] Allegedly comparable rates offered by the parties, with selected data, are set out in appendix

ton mile, is unlawfully high. In its rebuttal statement, protestant seeks to reinforce this conclusion through the introduction of a compilation of 20 coal movements in the West. The Elmendorf, Texas rate—a prescribed rate yielding 6.88 mills per ton mile—is said to demonstrate the unreasonableness of the proposed rate.

In reply, respondents introduced seven rates on high-volume coal movements which originate at or near the McKinley mine, the source of AEPC's coal.[14] These rates allegedly represent a well-established coal rate structure from Gallup and a proper basis for comparison with respondents' proposed capital incentive rate. Four of these seven rates are published on an annual volume basis. According to respondents, the remaining three, although single-car rates with no minimum annual volume, are moving large volumes of coal.[15] On the basis of this evidence, respondents assert that their proposed capital incentive rate produces revenues per ton mile on the low end of the Gallup rate structure.

On the seven rate comparisons, respondents view the existing annual volume rates from Gallup to Joseph City, Ariz.,[16] as particularly appropriate for comparison to the AEPC movement to Cochise: both movements will originate at the McKinley mine at Gallup; both movements will consist of approximately 1 million tons of coal of identical quality; both movements will go to electric utilities with contiguous franchise service areas; and both movements are commencing in 1978 at a time when the demand for coal is comparable. Respondents assert that these rates were established by negotiation at levels comparable to all other movements from Gallup.

In addition, respondents point out that there is a currently effective single-car rate of $12.53 applicable over the proposed route of movement in railroad-owned cars. When the cost savings for unit-train movements are subtracted (using respondent's calculations), a "volume rate" of $10.10 per ton results. Respondents contend that AEPC has not even attempted to demonstrate that their unit-train operation will produce economies which justify a discount from the rate levels now applicable from Gallup.

[14] See appendix C.

[15] In defense of the validity of these latter comparisons, respondents cite Ex Parte No. 270 (Sub-No. 4), *supra*, at 509, where the Commission observed that it is likely that the level of single-car rates was considered in establishing unit-train rates.

[16] See appendix C, respondents' rate numbers 1 and 2.

Respondents aver that the rates relied upon by AEPC were implemented or negotiated at a time when the railroads were attempting to develop the coal transportation market in the West. Price and demand for coal were relatively low. Competitive factors, including alternative fuels and other modes of transportation were different. As a result, respondents state that the only way coal could move by rail in volume was to quote rates which made only a relatively small contribution to fixed costs and return requirements. Respondents claim that they have sought and are seeking to renegotiate many of these rates which they deem at the low end of the zone of reasonableness.

Respondents state that the need today is less to stimulate new volume coal movements than to raise capital necessary to enable the railroads to handle those movements. They indicate that while the mine-head price of coal has tripled since 1970, the demand for coal and its transportation has increased because of the even more rapid increases in the price of other fuels.

Respondents seek to show that none of protestant's eight rate comparisons presents a valid basis for comparison with the proposed rate. The York Canyon[17] rate, which became effective in 1966, applies to transportation of metallurgical coal which is allegedly a market distinguishable from coal used in the generation of electricity. Respondents state that York Canyon was Santa Fe's first experience in unit-train ratemaking and, in retrospect, was a serious economic mistake. Respondents are currently renegotiating that rate. The Sunnyside rate also applies to metallurgical coal and is allegedly depressed by the York Canyon rate which affected the level at which it was negotiated. Respondents assert that the Colstrip rate was established in light of two competitive factors—potential eastern coal sources and nuclear power. The Belle Ayr rates to Amarillo and Pueblo were allegedly established under the competitive influence of coal sources from Colorado and New Mexico. A witness for respondent states that his contacts with officials of the Milwaukee Road indicate that the carrier considers the rate on lignite from Gascoyne to be depressed. Finally, respondents contend that the value of coal as an energy source has greatly increased since the Dana-Hanna rates became effective in 1972 and they are outdated as bases for comparison to the instant rate. In addition, the Dana-Hanna to Kansas City rate, published to

[17]This reference and those following in text are to the origin points in protestants comparability evidence. See appendix C.

serve the Kansas City Power & Light Company, is allegedly depressed because that company was considering nuclear power and was negotiating with the Burlington Northern for transportation of coal from another source.

Ultimately, respondents contend, any reliance on rate comparisons must be measured against the provisions of the 4R Act, the purpose of which was to effect change by breaking the pattern of past practices, increasing the range of managerial discretion, and enabling the railroads to move to a healthier financial condition. Therefore, respondents argue, even if it were concluded that lower rates made or negotiated prior to the 4R Act are or were comparable to the instant proposal, that fact should not be permitted to frustrate congressional policy with respect to new rates.

Other matters.—Protestant attacks the proposed schedules on several other bases. First, it observes that respondents as common carriers by railroad, are obligated to offer adequate interstate transportation services over their lines under section 1(4) of the act and must furnish safe and adequate cars and locomotives under section 1(11). Protestant contends that the instant proposal, predicated on investments which are obligatory and common to all traffic, is prejudicial and discriminatory under sections 2 and 3(1) of the act and constitutes an illegal practice under section 1(6).

Secondly, protestant alleges that a charge of $47 per switch for cars added or removed from trains at the Apache Station[18] is both discriminatory (because such services are customarily rendered without charge) and unlawful because such a charge cannot be justified where all costs of the service are covered by the line-haul rate.

Thirdly, protestant points out that AEPC, and not respondents, will furnish cars for the proposed service. Protestant contends that item 130 of the proposed schedule deprives AEPC of a mileage allowance for its cars and thereby violates section 15(15)[19] of the act.

Finally, protestant alleges that item 150 of the proposed schedule which obligates AEPC to ship a minimum of 1 million tons of coal annually, if it is to ship at the proposed rate, is unlawful because the proposed schedule contains no corresponding commitment on the part of respondents to perform the service. Respondents' inability to transport this annual tonnage would not relieve protestant of the

[18]See appendix A, item 148.

[19]Formerly section 15(13).

tariff obligation to pay for the 1 million tons or pay allegedly exorbitant alternative charges.

In reply to protestant's charges of unlawful prejudice and discrimination, respondents cite the *San Antonio* case, *supra,* where the Commission found no merit to similar claims. Respondents contend that the failure to propose rates in carrier-supplied cars is academic in view of AEPC's early decision in 1974 to purchase its own specialized equipment. Respondents further contend that they are free to publish lower tariff rates, as they have done here, reflecting the shipper car ownership costs without providing an allowance in these tariffs.

DISCUSSION AND CONCLUSIONS

Section 15(19) permits a common carrier by railroad to file a proposed capital incentive rate schedule "whenever the implementation of the proposed schedule would require a total capital investment of $1 million or more ***." In Ex Parte No. 327, *supra,* at 764, the Commission, interpreting that language, made the following comments:

> Section 15(19) provides incentive for large-scale investment made pursuant to a single, verifiable plan. A schedule proposed under the section must relate closely to such investment. Thus, the investment should have a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Ordinarily, eligible capital investment will be for the purpose of promoting innovative or improved service or attracting new traffic. Investment devoted to the preservation of existing levels of service, as for the repair or maintenance of a railroad's general equipment and facilities, in most instances could not be associated with a particular rate modification or new rate; such investment would not be within the purview of section 15(19). 353 I.C.C. 764, 765.

Since it is clear that the usual practice of railroads offering coal unit-train service is to pool available locomotive power rather than dedicate particular locomotives to a particular service, we do not believe that the total cost of all the new locomotives should necessarily be considered as qualifying the proposed schedule for capital incentive rate treatment. While we reject an interpretation of section 15(19) that would make "dedication" of plant or equipment (which is the subject of the capital investment) a prerequisite to treatment under section 15(19) there must be a proper allocation between existing and new equipment and a showing that the additional locomotive power is needed for the new service rather than for the carrier to fulfill its statutory obligation.

However, in this instance we are convinced that the threshold $1 million requirement has been met.

The Commission has previously recognized that new large-scale unit-train coal service ordinarily requires the purchase of new locomotives and related equipment. In *San Antonio, supra,* the Commission included the cost of the additional locomotives and cabooses required because of the coal traffic to San Antonio when it calculated the cost of moving that traffic. We have done so in this proceeding as well.[20]

We find that respondents' capital investment in roadway, as completed and as planned for 1978, also qualifies the proposed schedule for treatment under section 15(19). In Ex Parte No. 327, *supra,* at 764, 765, we stated:

> A shipper, or, for that matter, a railroad investment devoted to rebuilding the main line of a rail line served by many originating or terminating shippers could not ordinarily serve as the basis for rate modifications affecting the multitude of traffic over the main line.
>
> * * * * * * *
>
> The distinction drawn between [capital investments involving specific traffic and rates applicable thereto of the railroad(s) on whose lines the investment takes place and capital projects that affect the general run of the investing railroad(s) business] is a relevant one. We agree that systemwide rate modification predicated upon major investment affecting traffic generally was not contemplated as within the scope of section 15(19). The expedited procedures prescribed in section 15(19) and in the regulations herein adopted were not intended to accommodate a proceeding in the nature of a general rate increase. *Only capital investment projects having an identifiable effect upon specific traffic would satisfy the requirement of a nexus between the investment and the implementation of the proposed scheduled.*

Testimony presented by the parties focuses on respondents' claimed need for roadway improvements between the mine site near Gallup and Deming, N. Mex. Protestant's position that the AEPC unit-train traffic could move tomorrow over the proposed route and that proposed capital investments, scheduled to be made during the first year of the service, are not required to implement the new service would unduly restrict the applicability of section 15(19). That section refers to "implementation of the proposed schedule" rather than mere initiation of service. The proposed schedule in this proceeding is designed for the transportation of large volumes of coal in unit-train service over a number of years. Such large-scale

[20] In this proceeding, unlike *San Antonio,* we have included the total cost of locomotives to be purchased in our restatement of cost.

movements of coal are not currently made over the route involved here. The currently effective tariff on coal between the named origin and destination does not apply to unit-train service; it is confined to carrier-owned cars at a single-car rate of $12.53 per ton.

We think that respondents have adequately demonstrated, with specific details of needed improvements, that major capital investments in roadway will be required to implement the proposed schedule and that such investments are directly identified with the specialized service requirements demanded by AEPC. Protestant's emphasis on the adequacy of the track in its present condition to handle initial unit-train movements ignores safety and service factors which must be considered if 1 million tons per year of AEPC coal is to move safely and reliably under the proposed schedule.

Before a finding that a proposed rate is unreasonably high can be made, section 1(5)(b) of the act requires that a finding of market dominance be made. Protestant has introduced evidence that respondents have acknowledged market dominance over the subject traffic in docket No. 36515, ***Arizona Electric Power Cooperative, Inc.* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*** Respondents do not dispute that claim. Therefore, we find that respondents do have market dominance over the AEPC traffic.

The parties' rate comparisons reveal widely disparate results. Protestant's evidence contains a compilation of numerous large-volume coal movements from throughout the West. These comparisons demonstrate, in protestant's view, that the proposed rate of $8.64, producing revenues of 16.5 mills per ton mile, is excessive. Respondents' evidence, by contrast, focuses on the rate structure for coal emanating from the source (Gallup, N. Mex.) from which the AEPC coal will move. Those rates are probative evidence that the proposed rate is just and reasonable.

We agree that protestant's allegedly comparable rates are not probative of maximum reasonableness. First, respondents have demonstrated on a rate-by-rate basis that each of the eight rates selected by protestant as most similar to the AEPC traffic is depressed or outdated by competition and other factors peculiar to the specific traffic. Secondly, evidence submitted by respondents on the recent impact of inflation on railroad costs, the increased value of coal as an energy source, the increased demand for its transportation, and the concomitant change in competitive factors which affect negotiation for coal transportation must be considered in evaluating the probative value of protestant's rate comparisons. Respondents' evidence supports an inference that coal rates established before the present energy crisis may be too low when

current value of service factors are considred. Moreover, respondents have indicated that many of these rates are being renegotiated with shippers. Rates implemented or negotiated at a time when the railroads were attempting to develop a volume coal transportation market, should not be given controlling weight in establishing the maximum reasonableness of a new rate proposed under current conditions. Moreover, the need today is less to stimulate a volume coal market than it is to raise capital necessary for the railroads to handle these movements.

We believe that respondents' evidence on the Gallup coal rate structure is a more reliable measure of the reasonableness of the proposed rate because of the close relationship to the subject traffic. In particular, the rates from Gallup to Joseph City, Ariz., are comparable in terms of origin, volume, shipper (electric utility), and the time (1978) when movements will commence. Distance and car ownership discrepancies are more than adequately accounted for by rates which yield revenues, (in mills per ton mile) almost twice that of the proposed rate. The rate from Gallup to Snowflake, Ariz., although bearing only one third of the volume of the proposed movement is also comparable. The volume rate from Gallup to Trona, Calif., is perhaps the best basis for comparison to the AEPC movement because the distance (749 miles) is roughly analogous to the 523 mile movement from Gallup to Cochise. When the difference between shipper and carrier-owned cars in terms of cost to the carriers is taken into account, and the slightly longer distance is considered, the Trona rate compares favorably with the proposed rate of $8.64 in terms of revenue in mills per ton mile. The three other Gallup rates are single-car rates and are, therefore, less reliable comparisons. Nevertheless, the proposed rate, when viewed in the context of the Gallup rate structure as a whole, does not appear unreasonable.

We note, in conjunction with the evidence presented by respondents on the Gallup rate structure, that protestant has chosen not to comment on these rates in its rebuttal statement. Instead, protestant's rebuttal statement supplemented the original list of eight allegedly comparable rates with others, chosen apparently at random from throughout the West.[21] Respondents have not had an

[21]Protestant's rebuttal statement also stresses the significance of a prescribed rate from Cordero, Wyo., to Elmendorf, Tex. Reliance on that rate here is misplaced. The rate was prescribed by the Commission in *San Antonio, supra,* so that movement of coal could commence to meet the shipper's needs. It was expressly stated by the Commission that, as actual experience was gained, reopening could be requested. By order of the Commission, served October 27, 1977, that proceeding has now been reopened. In light of the uncertainty at this time as to the outcome of the reopened proceeding we believe it is of limited use as a basis of comparison here.

opportunity to respond on a rate-by-rate basis to these as they did to the eight originally submitted. We consider these rates cumulative evidence and subject to the same criticisms previously discussed.

The cost evidence presented in this proceeding is another indicia of the reasonableness of the proposed rate. In our restatement of costs in appendix B, we have relied primarily on respondents' cost evidence (with several major exceptions) as the best evidence of record. As discussed more fully in appendix B, protestant has supplied very little explanation concerning the development of unit-costs and methodology relied on in its cost study. However, contrary to respondents' proposed method of computing variable cost of service, we have not included cost of equity capital in our computation of variable costs. In recent years, the Commission has recognized net investment (original costs less depreciation) to determine the cost base. In ***Rules To Govern Assembling & Presenting Cost Evidence***, 337 I.C.C. 298, 393 (1970), we took the position that while an allowance for return risk-bearing capital (equity and current debt costs) should not be considered as an element of variable cost, such an allowance may be considered as a factor in ratemaking. Accordingly, our restatement of the estimated cost reflects an allowance for cost of capital on the net investment basis utilizing embedded debt rates. Our restatement of the locomotive diesel unit and caboose capital costs reflects our use of a 7.85-percent return based on the average interest for equipment trust certificates. However, consistent with the underlying methodology in the ***San Antonio*** case, ***supra***, we have accepted their inclusion of incremental cost of fixed plant investment.[22] We have also directly allocated to the AEPC traffic the entire cost of new locomotives which respondents will purchase for the AEPC traffic, in accordance with respondents' methodology. Normally, system-average locomotive costs would be adjusted to reflect the new purchases and the cost of serving AEPC would be recomputed using these adjusted system averages. However, the carrier has not attempted to make these adjustments, and the protestant has failed to introduce data in sufficient detail to permit us to do so.[23]

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[22]As noted above in our discussion of whether the proposed schedule qualifies for treatment under section 15(19), we believe that the large volume of coal involved here will require substantial upgrading of fixed plant investment to handle the traffic safely and efficiently. Respondents' allocation of a portion of this incremental investment attributable to AEPC is based on projected annual tonnage moving over respondents' lines and does not appear unreasonable.

[23]To that extent, our restatement of cost may be slightly overstated. However, even if protestant's methodology could be verified, the small difference would not change the result in this proceeding. Even if no locomotive cost were included, a clearly inappropriate result, variable costs would be reduced by a maximum of 46 cents.

Our restatement produces a total variable cost per ton of $5.44 and a fully allocated cost per ton of $6.94 based on a dollar basis apportionment of constant costs.[24] The proposed rate of $8.64 is thus 159 percent of variable cost and 124 percent of fully allocated cost.

By not including respondents' use of an 11 percent after tax cost of capital in our computation of variable cost, we do not suggest that the current cost of equity capital should not be considered in the determination of the reasonableness of the proposed rate. The new standards for railroad ratemaking established in the 4R Act make it clear that the need for equity capital must be considered in determining adequate railroad revenue levels. The problem presented in this proceeding is that section 205 of the 4R Act had a dual effect: it made the considerations contained in section 15a(2) and (3) of the act inapplicable to railroads, while allowing the Commission two years to establish standards and procedures for implementing the new rule of ratemaking to be applied to the railroads by section 15a(4) o. the act. That section provides:

> With respect to common carriers by railroad, the Commission shall, ***within 24 months after the date of enactment, after notice and an opportunity for a hearing,*** develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient mangement to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the railing of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels ***. (Emphasis supplied.)

Thus, the Commission has until February of 1978 to adopt standards and procedures to assist the railroads to attain adequate revenue levels. The Commission is presently considering a wide variety of issues and options relating to this problem in a rulemaking proceeding Ex Parte No. 338, ***Standards and Procedures For The Establishment Of Adequate Railroad Revenue Levels.*** It would be inappropriate in the context of this proceeding to prescribe

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[24]We have used the dollar basis here because the allocation of constant costs on a ton-mile basis would in this case result in an inordinate portion of such costs being borne by extremely heavy-loading traffic such as AEPC's as opposed to relatively light loading traffic. See ***Rules For Presenting Cost Evidence, supra,*** at 322-23.

standards for future application which might prejudge the issues in that proceeding.[25] However, although the statute does not technically require application of adequate revenue considerations prior to February 5, 1978, the intent of Congress is clear and the Commission should affirmatively assist that policy to the extent possible pending the outcome of Ex Parte 338. This policy is particularly strong in a capital incentive rate proceeding. Congress clearly intended to encourage large-scale rail investment in an effort to improve physical facilities, operations, and structure and infuse badly needed equity capital into the railroad industry.

We do not find it necessary in this proceeding to apply any particular test to determine whether the proposed rates will yield revenue levels adequate to meet the 4R Act criteria, including the raising of needed equity capital, because we find respondents' proposed rate of $8.64 to be just and reasonable. Variable and fully allocated cost ratios of 159 and 124, respectively—based on our restatement of costs which does not include cost of equity capital—do not appear unreasonable in view of 4R Act purposes and goals previously discussed. Value of service is also a consideration in the context of this proceeding. Respondents' evidence as to the increasing value of coal and demand for its transportation is entitled to weight. We recognize that since much railroad traffic moves at rates below fully allocated cost because of competitive pressures, a railroad must be allowed to set some rates in excess of their full cost level where competition, market conditions, and demand permit. This is particularly true if 4R Act goals for the railroads are to be met.

We find no merit to protestant's allegations of discrimination and prejudice under sections 2 and 3(1) of the act. The claim that respondents' capital incentive rate proposal discriminates against AEPC because it is predicated on investments which are obligatory and common to all traffic is unsupported by section 15(19) of the act and the evidence in this case. As we have stated in Ex Parte No. 327, *supra,* section 15(19) requires that there be a reasonably direct connection between the capital investment and the proposed

[25] Respondents reliance on Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges—Formula Revision*, served August 10, 1977, is misplaced. In our Notice of Proposed Rulemaking, served November 11, 1976, we made it clear that it was not our intent to prejudge the outcome of the rulemaking proceeding mandated by section 205 (i.e., Ex Parte No. 338, *supra*) with respect to procedures and methodologies for treating cost of capital. Most importantly, the interim approach adopted there was in the context of determining basic per diem charges on for-hire cars. Whether that approach or any other will ultimately be applicable in a proceeding such as this must await the outcome of Ex Parte No. 338.

schedule. That connection is supported by the record in this proceeding.

Protestant's allegation that the failure of respondents' proposed schedule to provide it with an allowance for providing freight cars is in violation of section 15(15) is also without merit. There is a currently effective tariff applicable to transportation of coal in carrier-owned equipment on a single-car basis over the route of movement. Section 15(15) does not prohibit respondents from publishing lower tariff rates reflecting the shipper-ownership of cars and volume movements. See *Cooper-Jarett, Inc.* v. *United States,* 226 F. Supp. 318, 324 (D. Mo., 1964). It should also be noted that the cost of such cars has not been included in respondents' cost evidence nor in our restatement of the costs.

Protestant's charge that item 150 of the proposed tariff is unlawful under section 1 of the act and the national transportation policy is unconvincing. We note that that item is a "disability rule" which relieves protestant of the annual volume requirements in certain instances where the carrier is unable to transport the volume offered. We agree with protestant that that inclusion of a more extensive disability clause in the schedule would be prudent in the interest of preventing disputes in the future, but it is not necessary to require the carriers to do so here since section 15(19) does not relieve the carriers of their duty to provide service.

Protestant's claim that the switching charges contained in item 148 of the schedule are discriminatory and unlawful is without merit. We note that protestant has the burden of proof to show that the proposed charge is unlawful. Protestant's bare claim that the charge is not cost-justified is insufficient to meet that burden. Protestant's argument that similar charges have been absorbed into the line-haul rates for other movements ignores a basic purpose of the 4R Act. Section 101(b)(5) of the act states the congressional policy to promote separate pricing of distinct rail and rail-related services.[26] No convincing argument has been made on this record why a charge for extra switching in and out of unit-train service should be found unlawful.

Finally, we must dispose of protestant's petition to reject certain material tendered by respondents as reply evidence on September 26, 1977. Respondent replied to this petition. It is the contention of

[26] Pursuant to section 202 of the 4R Act, the Commission has established standards and procedures to encourage separate pricing of distinct rail services, *Procedures For Publication of Separate Rates,* 355 I.C.C. 683 (1977).

protestant that portions of the reply statement of September 26, 1977 are addressed to issues introduced in evidence by protestant in a rebuttal statement in another proceeding. Docket No. 36515, *Arizona Electric Power Cooperative, Inc.* v. *Atchison, Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company*. Respondents maintain that the issues of fact in the instant capital incentive rate proceeding and docket No. 36515 complaint case are identical and that the evidence is in fact relevant.

In the complaint case (docket No. 36515), which is currently pending, AEPC seeks prescription of rates to apply to the same transportation as is in issue in this capital incentive proceeding. We recognize that the almost simultaneous filing of pleadings in this proceeding and the complaint case may have led to procedural difficulties. Since the parties and factual issues are the same in both proceedings and a large portion of the material is cumulative in nature or simply argument, we do not believe that protestant would be prejudiced by consideration of the disputed material. Neveretheless, to the extent that respondents have commented on evidence which protestant has not introduced in this proceeding, respondents' testimony has not been considered in rendering a decision on the capital incentive rate.

Because the notice of intent and later pleadings filed by respondents indicate a discrepancy in the amount of capital investment that has or will be undertaken, we believe respondents should be required to file status reports with this Commission which set out in detail the capital investments actually made. Accordingly, this proceeding shall remain open for the limited purpose of receiving these reports, commencing 1 year from the effective date of any schedule found lawful herein. The reports should detail the specific investment(s) actually made, with identifying details of each, the dollar amount actually spent on each such investment, and the extent to which investments set forth by respondents herein were not actually made and the reasons therefor, together with any additional information respondents deem relevant.

The carriers should in such status reports allocate the amount of each expenditure attributable to the issue traffic. The parties should be aware of the Commission's responsibility to insure that the requirements of the 4R Act triggering the protections of section 15(9) have been met. If it appears that the minimum expenditures have not been made, or that the expenditures made are not attributable to the issue traffic, then the Commission will be required to take appropriate action. Options available in that event

would, of course, include a finding that the incentive rate protections do not apply.

We find:

(1) That implementation of respondents' proposed schedule, applicable on coal in unit-trains service moving from Gallup, N. Mex., to Cochise, Ariz., will require a total capital investment exceeding $1 million;

(2) That respondents have market dominance over the traffic at issue in this proceeding;

(3) The proposed rate of $8.64 has not been shown to be unjust or unreasonable or otherwise unlawful.

(4) This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER GRESHAM, concurring:

I am in agreement with the majority as to the ultimate result, but I cannot join its uncritical approval of the respondents' cost evidence, on the theory that it provides the best evidence of record.

I believe that is unrealistic to limit our restatement of the estimated cost of locomotive capital to an embedded debt rate of only 7.85 percent. I would give much more weight to the respondent's claims that the current cost of such capital is 11 percent, after taxes. There is no need to await the outcome of Ex Parte No. 338, when the issue is squarely before us now.

COMMISSIONER BROWN, not participating.

It is ordered: That respondents may file a rate on the subject traffic and movements, not to exceed a level of $8.64 per net ton,[27] subject to the findings and conclusions in this report and order, at any time within 180 days after the date of service of this report and order, to become effective on 30 days' notice. A schedule filed in compliance with this order may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under sections 1, 2, 3, or 4 of the act, except that the Commission may at any time order such schedule to be revised to a level equaling the variable

[27] Subject to imposition of general increases. See Ex Parte No. 327, *supra*.

costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carriers.

It is further ordered, That should respondents file a schedule based on provisions found lawful herein, they shall submit a detailed status report to the Commission 1 year from the effective date of any such schedule. This report shall state the specific qualifying investments actually made as of the date the report is filed, together with the amount actually spent on each investment, and shall also state the extent to which investments set forth by respondents herein were not actually made and the reasons therefor. The original and five copies of this report shall be served on the Commission and a copy shall be served on the Commission and a copy shall be served on all parties to this proceeding. The Commission reserves the right to order such additional reports as may become necessary during the effectiveness of any such schedule.

This proceeding shall remain open for the limited purpose of receiving such reports.

By the Commission.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

APPENDIX A

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

FREIGHT TARIFF NO.

(For participating Carriers, See Page 2 hereof)

JOINT UNIT TRAIN ALL-RAIL RATE ON COAL

FROM	TO
GALLUP, NEW MEXICO	COCHISE, ARIZONA

COAL UNIT TRAIN TARIFF

Governed, except as otherwise provided herein by Uniform Freight Classification. (See Item 5).

NOTICE—The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED: EFFECTIVE:

Issued by

The Atchison, Topeka and Santa Fe Railway Company
80 East Jackson Boulevard
Chicago, Illinois 60604

ATSF TARIFF

LIST OF PARTICIPATING CARRIERS

Abbreviation	Carrier
ATSF	Atchison, Topeka and Santa Fe Railway Company, The
SP	Southern Pacific Transportation Company

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

Item	Subject	Application
5	Description of Governing Classification	The term "UFC" or Uniform Freight Classification whenever it appears in this Tariff refers to Uniform Freight Classification 12, ICC 8 (Uniform Classification Committee, Agent).
10	Station Lists and Conditions	This tariff is governed by Official List of Open and Prepay Stations 91, Station List Publishing Company, Agent, ICC A-56 to the extent shown below: PREPAY REQUIREMENTS AND STATION CONDITIONS (a) For additions and abandonments of stations, and except as otherwise shown herein, for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight, and changes in station facilities. When a station is abandoned as of a date specified in the above named tariff, the rates from and to such station as published in this tariff are inapplicable on and after that date. GEOGRAPHICAL LIST OF STATIONS (b) For geographical locations of stations referred to in this tariff by station numbers. STATION NUMBERS (c) For the identification of stations when stations are shown or referred to by numbers in this tariff.
20	Reference to Tariffs, Items, Notes, Rules, Etc.	Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.
25	Capacities and Dimensions of Cars	For marked capacities, lengths, dimensions and cubical capacities of cars, see Official Railway Equipment Register, (The Railway Equipment and Publication Company, Agent, ICC RER 403).
35	Transfer Between Connecting Carriers	The joint rates published in this tariff include all charges for switching, drayage, or other transfer services at intermediate interchange points on shipments handled through and not stopped for special services at such interchange points.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

Item	Subject	Application
40	Consecutive Numbers	Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen, they will be understood to include both of the numbers shown.
45	Transit Privileges or Services	Shipments made under rates in this tariff are not subject to any transit privileges or services.
60	National Service Order Tariff	This tariff is subject to National Service Order Tariff 1-F, WTL. ICC. A-4954.
75	Method of Cancelling Items	As this tariff is supplemented, numbered items with letter suffixes cancel corresponding numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. EXAMPLE: Item 20-A cancels Item 20, and Item 40-B cancels Item 40-A, in a prior supplement which in turn cancelled Item 40.
80	Intermediate Application-Origin	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3, and 4 below, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this tariff, which point is intermediate to a point from which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies to the same destination, apply from such intermediate point to such destination and via such route the commodity rate in this tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route. NOTE 1.—The rate from the intermediate point authorized by this rule is subject to the same conditions to which the rate from the next point beyond is subject. NOTE 2.—When by reason of branch of diverging lines there are two or more "next beyond" points, apply the rate from the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points from which commodity rates on the same article via the same route are published in this tariff, apply via that route from the intermediate point the rate from the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point from which the lowest charge is applicable.

Rule 27 of Tariff Circular waived; ICC Permission No. 69-4036, amended.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

Item	Subject	Application
80	Intermediate Application-Origin—Con.	NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume during a specified period of time, from the intermediate origin point applicable over the same route to the same destination, the provisions of this rule are not applicable from such intermediate origin point.
85	Intermediate Application-Destination	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3 and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is not named in this tariff, which point is intermediate to a point to which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate in this tariff on said article to the next point beyond to which a commodity rate is published herein on that article to the same destination via the same route. NOTE 1.—The rate to the intermediate point authorized by this rule is subject to the same conditions to which the rate to the next point beyond is subject. NOTE 2.—When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate to the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points to which commodity rates on the same article via the same route are published in this tariff, apply via that route to the intermediate point the rate to the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point to which the lowest charge is applicable. NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume during a specified period of time, to the intermediate destination applicable over the same route from the same origin, the provisions of this rule are not applicable to such intermediate destination point.

Rule 27 of Tariff Circular waived; ICC Permission No. 69-4036, amended.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

Item	Subject	Application
100	Method of Denoting Reissued Matter in Supplements	Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number, the number being that of the Supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.
105	Definition of Ton	Where the term ton is used in this tariff it means ton of 2,000 pounds.
		SPECIAL RULES AND REGULATIONS UNLIMITED
120	Demmurage	This tariff is not subject to provisions of Agent J. F. Doyle's Tariff 4-J, ICC H-59, nor Agent J. F. Doyle's Tariff 8-O, ICC H-30.
125	Weighing	Carriers will not perform service of weighing loaded cars of coal for the assessment of freight charges. Weights for billing purposes shall be determined by the weighing of coal by the consignor on scales or weightometers subject to supervision and verification by the TCFB Weighing and Inspection Bureau. If due to breakdown of such scales or weightometers, weight cannot be determined, the weight per train be used for the assessment of freight charges will be the aggregate of the marked capacities of the cars utilized.
130	Furnishing cars and minimum tenders	Rates in this tariff apply only on shipments tendered to ATSF in open top cars having marked capacity of not less than 195,000 pounds, furnished by consignee at no expense to the railroads, parties to this tariff, loaded to full visible capacity, subject to per shipment tenders of not less than 90 cars nor more than 95 cars on one bill of lading at one time from one consignor at one location at one origin, to one consignee for one delivery at one time at one location at one destination. No allowance will be paid by the carriers to the consignor, consignee or owner on such cars. Car maintenance will be borne by consignor, consignee, owner or lessee of such equipment. This tariff is not subject to the provisions of Agent J. F. Doyle's Tariff 7-E, ICC H-64.
132	Empty movement	Rates herein include return movement of the train of empty cars from a destination in this tariff to the same mine at an origin in this tariff.
135	Loading and unloading	Consignor will at its expense perform the loading of the cars at loading point. The origin carrier will move empty cars under the loading spouts at consignor's loading facilities at a controlled speed during the process of loading the cars. Consignee will at its expense perform the unloading of cars at consignee's unloading facilities at destination. The destination carrier will move loaded cars over the unloading facility at a controlled speed during the process of unloading the cars.

For explanation of abbreviations, see concluding page of this tariff.

SPECIAL RULES AND REGULATIONS
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Item	Subject	Application
137	Facilities	Consignors and consignees will provide facilities at origin and destination to permit receipt by ATSF and delivery by SP of unit train shipments contemplated herein.
138	Advance notice of arrival of cars at loading points	The ordering of cars in the case of a shipment under this tariff will not be required. Cars will be made available for loading immediately upon arrival at origin point. The agent of the origin carrier will furnish the consignor not less than 4 hours advance notice by telephone of the arrival of said cars at origin loading point. Agent of the origin carrier will keep a running record of the hour and minute that advance notice was furnished.
140	Loading time and origin destination	1.-All loaded cars in each shipment shall be tendered to the ATSF for movement to destination within four (4) hours after actual placement by the ATSF of first empty car at consignor's loading facility to load by consignor or within two (2) hours after notice of constructive placement (See Paragraph 2). 2.-When actual placement of all empty cars for loading cannot be made on account of the inability of the consignor to receive them, or because of any other condition attributable to the consignor, such cars will be held at origin, or, if they cannot be accommodated at origin, at an available hold point short of origin and notice shall be sent or given to the consignor that the ATSF is unable to place all the empty cars for loading. This will be considered constructive placement. (See Note) 3.-After the expiration of the free time in Paragraph 1 above, the consignor will be assessed a charge of $230.00 per hour for each hour or fraction thereof up to a maximum of four (4) hours of delay of the shipment. For any additional delay of the shipment, an added charge of $2470.00 will be assessed for each additional eight (8) hour period. In the event any of the disabilities referred to in Paragraph (h) of Item 150 other than mechanical breakdown or fire in consignor's plant or facilities including carrier's mechanical failure or other train delay directly attributable to carriers prevents consignor from loading shipment, the free time will be extended for an additional period equivalent to the time such disability prevents such consignor from loading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevented such loading including the time and date such disability originated and terminated. NOTE—If, at carrier's option, empty cars are held short of origin, time required for movement of said cars from hold point to origin to consignor's loading facility will not be included in the computation of free time.

For explanation of abbreviations, see concluding page of this tariff.

SPECIAL RULES AND REGULATIONS
UNLIMITED

Item	Subject	Application
145	Unloading time and destination detention	Two (2) hours free time will be allowed for unloading all cars included in a unit train shipment, the free time to be computed from the time of actual or constructive placement of all cars in such consignment. Actual placement is made when all cars of the unit train consignment have been placed in position on consignee's unloading facility. If such actual placement is prevented due to any cause attributable to the consignee, the cars shall be considered constructively placed (See Note 1). After the expiration of the free time allowed in the preceding paragraph, the consignee will be assessed a charge of $188.00 per hour for each hour or fraction thereof up to a maximum of eight (8) hours for the shipment. For any additional delay of the shipment, an added charge of $2400.00 will be assessed for each additional eight (8) hour period. In the event any of the disabilities referred to in Paragraph (h) of Item 150, other than mechanical breakdown or fire in consignee's plant or facilities prevent consignee from unloading shipments, the free time will be extended for an additional period equivalent to the time such disability prevents consignee from unloading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevented such unloading including the time and date such disability originated and terminated. NOTE 1.—When actual placement of all loaded cars in a consignment cannot be made because of any condition attributable to the consignee, such cars will be held at an available hold point and a constructive placement notice shall be sent or given to the consignee immediately after arrival of cars at hold point. This will be considered constructive placement.
148	Extra switching incident to Removing and/or adding cars to unit train	When consignor or consignee instructs carrier to remove (See Note) from and/or add cars to unit train, the following provisions apply: a) For such service performed and completed prior to expiration of allowed loading or unloading time as provided in Items 140 or 145 of this tariff, consignee or consignor will be assessed an additional charge of $47.00 for each switch. b) For such service performed and completed after expiration of allowed loading or unloading time as provided in Items 140 or 145 of this tariff, consignee or consignor will be assessed charge of $110.00 for each switch in addition to the charge provided in Items 140 or 145 of this tariff. NOTE—Cars removed from unit train for subsequent movement to owner's repair facility and return will be subject to applicable rates, rules and regulations of tariffs on file with ICC, ACC or NMCC.

For explanation of abbreviations, see concluding page of this tariff.

SPECIAL RULES AND REGULATIONS
UNLIMITED

Item	Subject	Application
150	Application of rates	(Applicable only where specific reference is made to this item) (a) Except, as otherwise provided in Paragraph (h) and subject to the provisions of this item, rate in item making reference to this item is applicable only on shipments from a consignor at one origin in such item, to a consignee who receives at one destination in such item not less than the volume requirement specified in Paragraph (b) below of one or more of the commodities named in items referring to this item. VOLUME REQUIREMENTS (b) 1,000,000 tons received during the 12-month period commencing with the date of written notification to the ATSF and SP and thereafter during 12-month periods commencing with the anniversary day of the first 12-month period. (c) Initially, the rate in item making reference to this item shall be charged. (d) Before the beginning of each 12-month period described in Paragraph (b), the consignee shall furnish an indemnity bond as described in Paragraph (e) and notify ATSF and SP in writing of its intention to use rate authorized in Paragraph (a). (e) The indemnity bond must be in an amount sufficient to cover the difference between the amount of freight charges that would have been collected in accordance with Paragraph (c) and the amount that would accrue in the event consignee failed to meet the volume requirements of Paragraph (b). (f) If during any 12-month period described in Paragraph (b), the tonnage required of a consignee is not met, rate in item making reference to this item shall not be applicable on shipments that have been moved during that 12-month period unless the charges resulting from application of the rate in Item PSFB Tariff 100-Q, ICC 1970, exceed the lowest charges that would have been collected if the tonnage requirements had been met. In this event the deficit in tonnage shall be billed at the annual volume rate and be collected by SP. (g) Certification of shipments moving at such rates shall be made by SP. DISABILITY RULE (h) If during any calendar day or days (See Notes 2 and 3) in any 12-month period stated in Paragraph (b) of this item shipments cannot be made under rate referring hereto by a consignor to a consignee due to an act of God, strikes or lockouts in the railroad industry or stricks or lockouts or mechanical breakdown or fire (See Note 4) in the consignor's or consignee's plant or facilities (See Notes 1 and 5), the calendar day or days during that 12-month period in which shipments due to such occurences cannot be made shall be considered as a disability day or days and the

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS
UNLIMITED

Item	Subject	Application
150 (con't)	Application of rates	minimum aggregate tonnage required of that consignee during that 12-month period shall be reduced by 1/365 for each such disability day. Any day in which two or more of such events occur shall be considered as one disability day. NOTE 1.—The consignor, consignee or participating carrier encountering disability days shall within 30 days of the date the disability occurred notify the carrier or inspection bureau, as the case may be, having jurisdiction over the volume movement, of such disability and shall furnish a certificate stating: "This is to certify that on (month-day-year) the following disabilities occurred (here show type of disability as provided in Paragraph (h)) thereby resulting in authorized reduction in volume tonnage as specified in (here show specific paragraph, item number and ICC number of tariff)." NOTE 2.—If shipments are made by a consignor to a consignee under this item during any calendar day in which one or more of the events specified in this paragraph occur, that day with respect to shipments from the consignor to the consignee shall not be considered as a disability day. NOTE 3.—Saturdays, Sundays and legal holidays shall not be counted unless consignor's loading facilities or consignee's unloading facilities normally operate on those days. The term holidays embraces only the following: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. In the event one of the above holidays occurs on a Sunday, the following Monday will be considered as a holiday. Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in different states as "Memorial Day", "Decoration Day" or otherwise, and generally observed in lieu of May 30 will for the purpose of this item be treated as Memorial Day. NOTE 4.—A breakdown or fire in the consignor's or consignee's plant or facilities will include only the mechanical failure of equipment of consignor or consignee vital to the coal loading or unloading operation or any fire which renders the loading or unloading facilities inoperative. In order for carrier to be in a position to promptly make necessary arrangements to avoid expenses that occur in holding crew and power, such breakdown or fire must be immediately reported by telephone by the consignor or consignee to the origin or destination carrier and then immediately certified in writing by the consignor or consignee to the origin or destination carrier with sufficient evidence, including actual time of such breakdown or fire, to

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
150	Application of rates (con't)	substantiate a legitimate cause of disruption to consignor's or consignee's normal coal loading or unloading operation. The consignor or consignee must also immediately report by telephone and then immediately certify in writing to the origin or destination carrier the exact time the cause of such breakdown or fire terminates. NOTE 5.—Mechanical breakdown or fire in consignor's or consignee's plant or facility as referred to herein will only apply as a disability day for computing reduced minimum aggregate tonnage but such disability will be subject to provisions of Item 145. Rule 4(i) of Tariff Circular waived; ICC Permission No.

Rates in cents per ton

Item	Commodity	From	To	Rate
200	COAL Subject to Item 150. Min. Wt. marked capacity of car used, except when car is loaded to full space capacity, actual weight will apply, but not less than 195,000 lbs. per car. Applies only via ATSF, Deming, NM. SP	Gallup, NM	Cochise, Az	864

Explanation of abbreviations

Abbreviation	*Explanation*
ACC	Arizona Corporation Commission
ATSF	Atchison, Topeka and Santa Fe Railway Company, The
ICC	Interstate Commerce Commission
Min. Wt.	Minimum Weight
NMCC	New Mexico State Corporation Commission
PSFB	Pacific Southcoast Freight Bureau, Agent
RER	Railway Equipment Register
SP	Southern Pacific Transportation Company
TCFB	Trans-Continental Freight Bureau
UFC	Uniform Freight Classification (Uniform Classification Committee, Agent)
WTL	Western Trunk Lines (Western Trunk Line Committee, Agent)

APPENDIX B

Analysis of cost data

I. INTRODUCTION

Arizona Electric Power Cooperative, Inc. (AEPC) is engaged in the construction of two new electric generating units at its Apache Station located at Cochise, Ariz. The $270 million facility will burn 1 million tons of coal annually. The coal supplies will be obtained from sources near Gallup, N. Mex.

AEPC originally brought a complaint against the Atchison, Topeka and Santa Fe Railway Company (AT&SF or Santa Fe) and Southern Pacific Transportation Company (SP) in docket No. 36515, ***Arizona Electric Power Cooperative, Inc.* v. *The Atchison Topeka and Santa Fe Railway Company and Southern Pacific Transportation Company.*** The complainant requested that the Commission prescribe a rate of $4.38 per ton for the movement of an annual volume of one million tons of coal in shipper supplied cars from Gallup, N. Mex., to Cochise, Ariz. At that time, the rate applicable to coal from the subject origin to subject destination was $12.53 per ton in railroad supplied cars and $12.16 per ton in shipper owned cars.

Subsequent to the complaint filed in docket No. 36515, *supra*, the AT&SF and SP filed a "Notice of Intention to File Schedules Containing a Capital Investment Rate on Coal from Gallup, New Mexico to Cochise, Arizona."

The AT&SF and SP, hereinafter referred to as respondents, propose a freight rate of $8.64 per net ton. The proposed tariff specifies that the rate referred to above will be applicable only to a minimum tender of 1 million tons annually in other than carrier-owned equipment and would further apply only to shipment tenders of not less than 90 cars nor more than 95 cars loaded to full visible capacity, subject to a minimum weight of 195,000 pounds per car. Shipments would move on one bill of lading from one consignor to one consignee. The rate further includes the return movement of empty cars to the origin mine. No allowance will be paid by the railroads to the owner of the cars. In addition to the line-haul freight rate, the railroad's proposed schedule includes a charge of $47 for switching performed at the AEPC plant.

The proposed capital incentive rate was initiated because respondents claim it will be necessary to make a capital investment of approximately $12 million. Pursuant to section 206 of the Railroad Revitalization and Regulatory Reform Act of 1976, a carrier may file a notice of intent to file a new rate whenever the implementation of the proposed schedule would require a total capital investment of $1 million or more. Unless the Commission determines that the proposed rate is unlawful, the carrier may file the schedule, which may not then be set aside as unlawful for a period of 5 years after its effective date. Accordingly, unless the proposed rate is found to be unlawful, no rate can be prescribed in the above referenced complaint proceeding.

The evidence of record in the instant proceeding is co-mingled with the evidence in the related complaint case. (Docket No. 36515.) Although AEPC, hereinafter referred to as protestant, developed a variable cost per ton of $3.31, in the instant proceeding; it subsequently presented its cost showing to reflect a variable cost of $2.92 per ton in its rebuttal statement in docket No. 36515, *supra*.

Our analysis of the instant proceeding follows below and is confined to cost evidence of record in docket No. 36612.

II. PROTESTANT'S OPENING STATEMENT

Arizona Electric Power Cooperative, Inc. (protestant) introduced a variable cost per ton of $3.31 which equates to a variable cost per carload of $327.36.

Protestant contends its presentation of variable costs was developed using 1976 basic Rail Form A[1] unit costs for each of the involved railroads, (SP and AT&SF). Such Rail Form A costs were indexed to July 1, 1977, based on AAR (Association of American Railroads) indices for fuel, material, and supplies and labor. Update factors were developed separately for application to the Rail Form A data of each railroad.

Protestant has, were possible, substituted direct costs and adjusted Rail Form A unit costs to reflect the traffic and operating characteristics peculiar to the subject traffic. Table I below, is a summary of traffic and operating characteristics used by protestant in its development of variable costs.

TABLE I

Summary of traffic and operating facts used in developing variable costs

Item	AT&SF	SP	Total
1. Annual volume-tons	--------	-------	1,000,000
2. One-way mileage	371	152	523
Car characteristics			
3. Average load per car-tons	99	99	99
4. Tare weight per car-tons	32.5	32.5	32.5
Train characteristics			
5. Cars per train	73	73	73
6. Train sets	1	1	1
7. Trips per year per train set	140	140	140
8. Average diesel units per carrier	4.0	4.0	4.0
9. Round trip gross ton miles	60,844	24,928	85,772
10. Cycle time used-hours	60	60	60
11. Crews (roundtrip)	5	2	7

Protestant indicates that the average load per car and the tare weight per car (shown in table I) were taken from the design specifications of the manufacturer. Further, protestant states that based on a "recent field survey" it was determined that four diesel-electric locomotive units would be required by each railroad in completing its portion of the subject movement.

Expenses relating to train crew cost and station clerical expense were developed separately in lieu of the corresponding unit costs in Rail Form A. Train crew cost per carload was derived using basic daily and mileage rates as of July 1, 1977, actual crew districts and mileages, actual weights of the locomotive units (used to determine

[1]Rail Form A (ICC Statement No. 1F1-73), *Formula for Use in Determining Rail Freight Service Costs.*

engineers' and fireman's wages), actual crew size, general overhead and transportation departmental overhead ratios (based on the individual carrier's Rail Form A), and a constructive allowance ratio developed from the individual carriers' wage statistics. Station clerical expense was estimated at $1.25 per carload and reflects the billing of a coal unit train in shipper-owned cars. No further support was offered for this estimate.

Loss and damage cost per carload, utilized by protestant, was taken from railroad evidence filed in docket No. 36180, *San Antonio, Texas* v. *Burlington Northern, Inc. et al.*

The remaining unit costs, used by protestant, were developed according to normal Rail Form A procedures. Results of protestants' cost study is shown in table 2, below:

TABLE 2

Protestants presentation of variable costs of service as of July 1, 1977, for movement of coal in unit trains from Gallup, N. Mex., to Cochise, Ariz.

Cost Items	AT&SF	SP	Total
1. Gross ton-mile cost per carload	$127.18	$46.51	$173.69
2. Loco unit-mile cost per carload	39.89	24.22	64.11
3. Crew cost per carload	40.65	17.20	57.85
4. Train-mile (other) cost per carload	9.47	4.55	14.02
5. Car inspection cost per carload	5.76	1.91	7.67
6. Train supplies and expense per carload	4.66	0.89	5.55
7. Carload claims clerical	1.21	1.21	2.42
8. Station clerical cost per carload	0.625	0.625	1.25
9. Loss and damage cost per carload	0.57	0.23	0.80
10. Total variable cost per carload	230.015	97.345	327.36
11. Total variable cost per ton (line 10 ÷ 99 tons/car)			3.31

III. RESPONDENTS' EVIDENCE

Respondents state that the cost conclusions and data submitted by protestant are not a correct determination of the costs of the proposed service. Protestant's development of a cost of $3.31 per ton ignores several significant aspects of the transportation service which would have to be provided. In order to demonstrate the errors in protestant's cost representation, respondents prepared a cost analysis of the proposed service, making computations to account for actual operating characteristics and to correct for certain fundamental errors made by protestant. Respondents' costs give effect to cost of capital as well as specific capital requirements of the proposed service. The results of respondents' computations produced a variable cost of $6.56 per ton and a fully allocated cost of $9.32 per ton (ton and ton-mile basis) and $8.36 per ton (dollar basis).[2]

Respondents contend that protestant's description of the proposed train movement is materially inaccurate in terms of actual operations required for movement of the proposed train. Specific errors cited are as follows:

[2]These figures, as explained below, were subsequently adjusted.

(1) The AEPC coal unit train is designed to accommodate 92 cars per train rather than the 73 used by protestant.

(2) The cars to be used have a capacity of 98 net tons with a tare weight of 33.5 tons. AEPC's computations reflected a lading weight of 99 tons and a tare weight of 32.5 tons.

(3) The correct trailing gross weight per loaded train is 12,098 tons. Protestant showed 7,143 tons.

(4) AEPC's assumption that the movement between Defiance, N. Mex., and Cochise, Ariz., will require only four diesel units is in error. Because of physical and traffic characteristics between Defiance and Deming, New Mexico it will be necessary to use six locomotives in order to sustain the necessary schedule reliability.

(5) Protestant incorrectly assumed that railroad crews will incur only system average deadheading requirements. A crew must be deadheaded from El Paso to Deming to take the empty train to Belen. Following arrival at Belen, the crew is deadheaded to El Paso. The crew for the loaded train must be deadheaded to Belen from El Paso far enough in advance of the loaded train's arrival in Belen to be fully rested when the train is called out of Belen. The total deadheading for each El Paso district crew will be 353 rail miles per trip, loaded or empty, for a total of 706 miles of deadheading per cycle.

(6) AEPC also omitted any estimate of locomotive expenses incurred during the loading and unloading processes.

Respondents' year—1976, Rail Form A costs were adjusted to reflect probable operating conditions. The Rail Form A unit cost factors developed by protestant were found to be in general agreement with those developed by the railroads, although significant variances were noted. AEPC's use of a rate of return equal to the historic cost of embedded debt, accounts for the principal differences in the cost estimates. Differences in other cost factors are discussed below:

(1) *Inflation index.*—Protestant erred in the computation of this index. Rather than computing the year 1976 to July 1, 1977 index, it computed year end 1976 to year end 1977 index estimate. Also, protestant failed to exclude those portions of Railway Tax Accruals which are properly attributable to passenger service. These errors were further compounded by use of incorrect weightings in the fuel indices and by subtraction of car-hire debt rather than addition of them to the expenses. Also fuel expenses were double counted.

(2) *Gross ton-mile expenses.*—Included in the gross ton-mile expense portion of respondents' costs is a correction factor which adjusts the unit cost for accelerated maintenance of way expenses directly attributable to the high axle loadings experienced with coal unit-trains. The cost of accelerated maintenance of roadway caused by heavily loaded cars has been erroneously ignored by protestant. The effect of respondents' adjustment is to increase the gross ton mile maintenance-of-way expense portion for the specific route at issue from 0.12176 cents per GTM to 0.15486 cents per GTM.

(3) *Locomotive unit-mile expense.*—Since locomotive investment is treated separately, respondents' Rail Form A locomotive unit-mile factor has been adjusted by removal of the locomotive investment terms. A further adjustment has been made to reflect use of six-axle locomotives which will be used in the subject operation.

(4) *Train mile crew wages.*—Crew wages have been computed separately and used in lieu of system average numbers. Respondents state that their results differ from those of protestant principally because of the use of actual crew rates in the classes of service over the crew districts involved. Both protestant and respondents used wage

rates in effect on July 1, 1977. Respondents' factors have been further adjusted to reflect the utilization of firemen during the month of April 1977, with further adjustments mandated by extant local labor contracts. Actual deadheading requirements were reflected in respondents' costs. In all instances the actual crew wages have been adjusted to reflect the appropriate constructive allowances. Calculation of the train-mile crew wage factor was based on the applicable rates of pay for each crew district.

(5) *Train mile (other expense).*—To permit separate treatment of the incremental investment in waycars, all waycar investment expense has been removed from the train-mile other portion of the gross-ton-mile factor.

(6) *Train supplies and expense running.*—Both protestant and respondents have excluded the terminal portion of train supplies and expenses.

(7) *Station clerical expense.*—Protestant used a cost of $1.25 per carload for station billing expense. Nowhere in its statement or workpapers is the origin of the $1.25 supported. In the absence of a recent special study, respondents have applied the technique used in Ex Parte No. 270 (Sub-No. 4) to estimate the station clerical expense. This procedure assumes that 75 percent of the cost is associated with the car and the remaining 25 percent is associated with the shipment.

(8) *Claims clerical and special services.*—Claims clerical expense has been used without modification; however, special services expense has been omitted by both protestant and respondents as being unrepresentative of unit-train service.

(9) *Car inspection-mileage.*—Both protestant and respondents have used this expense item without modification.

(10) *Loss and damage expense.*—The Santa Fe and the SP have each used its 1976 loss and damage expense rate per ton for coal originated and terminated. A mileage-weighted-average of the Santa Fe and SP rates has been applied to the subject movement.

(11) *Other than unit-train switching.*—Protestant has dismissed an recognition of yard switching attributable to unit-train operations. This omission fails to give any consideration of how bad order cars found in terminal inspection would be removed, how cabooses would be rotated for servicing, how individual locomotive units in the consist would be cut out for repairs or Federal inspections, or how bad order cars would be restored to service. All of these items obviously require the service of a yard engine and crew.

Respondents' estimate of the correct yard switching hours required in handling the subject movements is detailed below:

Location	*Yard engine hours*
Belen, N. Mex:	
RCE-Unit switching	1.00
Caboose switching	.67
Locomotive switching	.75
Bad-order yard switching	.83
Total	3.25

(12) *Unit-train switching.*—Respondents contend that neither the routine gross-ton-mile expense factor used by protestant, nor the modified gross ton mile expense factor used by respondents are constructed in a manner which can properly reflect the

switching perfromed by the road crews at either origin or destination. Respondents have constructed an engine minute unit cost factor which excludes all motive power investment and crew wages. The transportation section of Rail Form A has been further modified by the exclusion of all yard-specific expense. In addition, to properly reflect ownership of the trackage at the mine and at the plant, the road property and land investment allocated to train switching in the cost of capital section has been excluded. This expense has also been adjusted to reflect the use of six road locomotive units in lieu of the system average 2.249 units. The results of the above computation are, respondents submit, the best available estimate of the added expense of handling this train with railroad-owned road locomotives at origin and destination. Respondents have used these results in lieu of the "Road Train to Industry" expense column of Rail Form A, Schedule B, whereas protestant has omitted recognition of such costs altogether.

(13) *Cost of capital.*—Respondents contend that the principal difference between their cost estimates and those developed by protestant is the treatment of the rate of return on net investment. Respondents note that protestant's witness Peabody used, as a rate of return, embedded debt rates of approximately 5.7 percent for SP and 6.1 percent for AT&SF in conformance with recognized Rail Form A costing techniques.

Respondent considers this rate of return to be wholly inadequate and has used current cost of capital figures of approximately 19.4 percent before taxes and 11.0 percent after taxes. The aforementioned rates of return were applied to respondents' embedded capital as well as their incremental investment. Respondents contend they are justified in using current cost of capital figures to reflect the economic reality of attempting to attract capital to the company and account for such variables which influence the investing community as interest, equity earnings, relative risk, and revenue generation.

(14) *Incremental investment.*—It is the position of AT&SF and SP that the relevant capital outlay relative to incremental investment is the cost of all items which are purchased as the result of the crew service, irrespective of any other uses which might incidentally occur, and not just the costs of the items that are to be used exclusively in this service. However, for purposes of their showing in this proceeding, respondent railroads have used an accounting separation of incremental costs in order to follow the approach outlined by the Commission in docket No. 36180, *San Antonio, Texas Acting By and Through its City Public Service Board* v. *Burlington Northern, Inc. et al.*

The capital costs applicable to this incremental investment have been disaggregated from the Rail Form A cost formula. The criteria for separation of these investment costs are as follows:

(1) A portion of the required investments are needed solely because of the subject service and should not, be comingled with joint use investments;

(2) The balance of the investments are of joint benefit to other segments of rail traffic, necessitating an apportionment of use among beneficiaries; and

(3) The investment costs attributable to such incremental investments must be recognized independently of embedded capital investment.

The annuity factor used to develop the annual capital cost for equipment is based on a 15 year asset life, zero percent net salvage value, 11 percent after tax cost of capital, and statutory tax rates.

The incremental investments for the year 1977 used by respondent railroads in their calculations total $7,576,496. The railroads contend that only by making the indicated

investments, can they offer a proper level of service which will minimize the total cost of the subject service. The cost minimization is achieved in that, as a result of the incremental investments, the railroads will be able to handle the issue traffic with optimum proportions of operating expenses and capital costs thereby enabling them to operate the subject service at maximum levels of efficiency.

Each element of incremental investment used by the railroads was justified on the basis of some form of cost benefit analysis. Equipment investments which include locomotives, RCE and waycars were predicated on the economic benefits of the availability of motive power, train size and train schedules. Way and structure investments, while more difficult to isolate, have benefits which are interrelated with those attributable to equipment.

The final unit costs applicable to incremental investment on the AT&SF were $0.682 per ton for equipment and $0.455 per ton for road. For the SP these costs were $0.323 per ton for equipment and $0.161 per ton for road. This equates to a total carload cost reflecting the incremental investment of both railroads, of $158.91 based on a load of 98 tons per car.

(15) *Fully allocated cost.*—Respondent railroads have computed fully allocated costs on both the ton and ton-mile basis and the dollar (ratio) basis. Respondents note that these costs were submitted solely for reference purposes and were not adopted as indicative of either economic reality or a standard for ratemaking. As previously noted herein, respondents have calculated fully allocated costs for the subject movement of $9.32 per ton (ton and ton-mile basis) and $8.36 per ton (dollar ratio basis).

* * * * * * *

Respondents separately adjusted the variable cost applicable to the issue traffic based on the context of the criticisms propounded by AEPC in its rebuttal statement filed in the complaint case referenced previously herein. Respondents' revised variable cost for the subject coal traffic is $6.06 per ton and $8.82 per ton at the fully allocated cost level (ton/ton-mile basis).

Respondents' statement contains voluminous discussion regarding methodologies used by protestant in docket No. 36515, *supra.* Our analysis will be confined to the relevant evidence presented in the instant proceeding.

In this revised analysis, respondents have made only one adjustment to their costs as shown previously. This adjustment was made in the gross ton-mile expense to correct for errors in the computation of maintenance-of-way expenses. Respondents initially used a direct assignment of maintenance-of-way expenses in developing their gross ton-mile expense. After adjustment, respondents' gross ton-mile cost reflects the maintenance-of-way expenses associated with the subject routing. However, the amount of such expense, which is included as part of that computation, reflects only the weighted average expense of the component track segments.

Respondents further corrected their gross ton-mile cost to reflect omissions of relevant expense items which should have been used to develop gross ton-mile expense initially. These omissions included several specific system and divisional expense items which are incurred for the benefit of all parts of the railroad and are not associated with any one segment. The other omission was a programing error which caused an apparent exclusion of $70 million of expense from the totals.

Correction of the aforementioned omissions resulted in a revised cost of 0.36354 cents for the expense portion of gross ton-mile cost. This equated to a reduction in the AT&SF line-haul costs of $0.50 per net ton or $49.21 on a carload basis.

IV. PROTESTANT'S REBUTTAL STATEMENT

Protestant did not specifically refute any of the respondents' cost evidence. However, it did challenge the validity of the $12 million claimed capital investment and concomitant incremental costs included in respondents' cost study. Protestant states that the motive power requirements, claimed by SP, have not been supported. Furthermore, protestant is of the opinion that railroad power is generally pooled for the benefit of the system traffic and that a given price of power equipment cannot be associated with a specific segment of traffic.

With regard to respondents' claimed incremental investment in roadway track structure improvement, protestant contends that a direct relationship between such claimed capital investment and AEPC's coal traffic is suspect. Protestant notes that respondents' witness Darling has apportioned the claimed roadway investment to the traffic of Arizona Electric by certain unsupported factors.

Finally, protestant avers that the $47 switching charge, contained in item 148 of respondents' proposed tariff, cannot be justified from a cost standpoint. The costs of the service, to which the $47 charge applies, is covered under the line-haul rate, according to protestant.

V. COMMENTS

Protestant has supplied very little explanation concerning the development of unit costs and methodologies relied on in its cost study. Although respondents have provided a rather detailed discussion of the differences between their costs and those of protestant, it is often unclear whether respondents are referring to supporting explanations offered by protestant in docket No. 36515, *supra*, or if the railroads are privy to some of protestant's workpapers, in the instant proceeding, which are not included in the record.

Both respondents and protestant used applications of Rail Form A as a basis for their respective cost studies. Each adjusted basic Rail Form A unit costs to reflect various operating and traffic characteristics and circumstances inherent in the transportation of the subject traffic. Both claim they indexed their unit costs to the July 1, 1977, cost level. As noted above, protestant's discussion of its data and cost methodologies is extremely limited. We note several specific deficiencies in protestant's cost study such as (1) the use of an unsupported figure ($1.25) reflecting the cost of station clerical service; (2) failure to give any recognition to yard switching performed in the unit-train operation; (3) failure to reflect the effects of heavy loading on maintenance-of-way expenses; and (4) the use of 73 cars in all their cost computations although the tariff specifies a required car tender of between 90 and 95 cars.

Accordingly, we have reviewed the cost methodology employed by respondents and find their revised costs to be the best evidence of record with one exception, explained hereinafter. Respondents stated that the basic Rail Form A unit costs computed by both parties are quite similar. However, respondents' adjustments to these costs and their recognition of certain cost items ignored by protestants, account for the significant differences in the adjusted unit costs.

Although we have found respondents' explanation of its cost methodology to be, for the most part, reasonable and appropriate; we are unable to accept their computation of return on investment which is a significant deviation from basic Rail Form A costing methodology.

In their presentation, respondents have deviated from Rail Form A procedures and techniques as to calculation of return on investment. Rail Form A unit costs reflect an allowance for cost of capital based on the percentage rate of interest on embedded debt. Respondents' procedure uses what they consider to be the current cost of capital of 19.4 percent before taxes and 11.0 percent after taxes. This accounts for the preponderance of the difference between the costs developed by respondents and protestant. The following excerpt is taken from docket No. 34013, ***Rules to Govern Assembling & Presenting Cost Evidence***, on 337 ICC 298, 393, "Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to be given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking ***. However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees with the explanation of the Cost Finding Section as to why equity capital invested in carriers' facilities should be treated in the same manner as similar debt capital."

In view of the above, from strictly a cost finding viewpoint, respondents' imputation of the 19.4 percent before tax and 11.0 percent after tax return on embedded capital, overstates the "costs" of the carriers. Protestant's use of the system average rate of return reflecting embedded debt rates of approximately 5.7 percent for SP and 6.1 percent for AT&SF could more closely approximate what are considered to be the actual "costs" of the carriers.

Regarding the issue of incremental investments, protestant has apparently excluded all claimed investment relative to track structure improvement and increased plant investment. Respondents indicate that protestant does reflect, to some extent, the cost of new locomotive units to be purchased for the transportation of the subject traffic. However, it appears protestant did no more than adjust the system average locomotive costs and then recompute the costs of serving AEPC using these adjusted averages. Protestants calculated the return on the locomotive incremental investment at 7.85 percent, which reflects the rate of current Equipment Trust Certificates. Respondents' claim the effect of this approach is to assign only a small fraction of the investment in new locomotive to AEPC traffic, the remainder of these costs would be borne by shippers who were not responsible for, and would not benefit from, the new investments.

Conversely, the railroads claim they have used an incremental costing method which attributes the additional cost, related to such investment, to AEPC which will receive the concomitant benefit. According to respondents, this method is supported by the Commission's ruling, with respect to incremental investment in docket No. 36180, *supra*. In that case the Commission treated the railroads' investment in upgrading and improving the line as an incremental cost to be borne by the coal shippers and it approved the railroad's practice of allocating a fair portion of those costs to the subject (San Antonio) movement.

In the instant proceeding, respondents have allocated to AEPC all the *cost of new locomotives*, required by the subject movement, resulting in an overstatement of this cost item. However, they properly included only those *plant expansion costs* which would be made for the purpose of handling the issue traffic and no portion of such costs to be incurred in future years.

Protestant's failure to include in its costs, those incremental investments related to plant and track structure improvement, is inconsistent with the Commission's decision in docket No. 36180, *supra*, and therefore such investment is included in our restatement. Also, based on this same decision, we find the incremental investment in locomotives should be allocated proportionally to the subject traffic. However, protestant's failure to produce underlying work papers or adequately substantiate its apportionment prevents our acceptance of its figures. Since protestant has the burden of proof in a capital incentive proceeding, we have accepted respondents' allocation, although we note that this will result in a slight overstatement of respondents' costs.

Protestant has supplied no costs at the fully allocated expense level. However, respondent calculated fully allocated costs based on two separate methods of apportioning constant costs, that is, the ton and ton-mile method and the dollar (ratio) method. However, in their reply statement, respondents have shown revised variable costs and only those fully allocated costs on the ton and ton-mile basis. With respect to the allocation of constant or joint costs, the following is taken from docket 34013, *supra*, 337 I.C.C. 298, 322, 323, "One of the important problems is that of allocation of constant and of joint or common costs among the individual transportation services. And, in this area we cannot overemphasize the necessity of making a distinction between costing and ratemaking. In costing, the direct expenses of providing a particular service, and the overall expenses incurred by the carrier, are fairly readily ascertainable. However, it is necessary to establish equitable methods of allocating the other-than-direct expenses among the different services, before an estimated cost of providing a particular service can be ascertained. Where constant costs are joint or common and are individible among the several services on any cost of service basis, any method of allocation will be arbitrary in some degree *** the determination that one method is preferable to another method of allocating expenses in a particular situation, is a ratemaking function *** a logical and reasonable allocation of expenses in one ratemaking situation might not be so in another ***. *For example, the allocation of constant costs on a ton-mile basis, might (for ratemaking purposes), in certain circumstances, result in an inordinate portion of such costs being borne by extremely heavy-loading traffic, as compared to relatively light-loading traffic.*" (Emphasis supplied.)

Based on the above comments from docket No. 34013, *supra*, we believe the dollar basis of apportioning constant costs would reflect a more appropriate apportionment of the constant costs to the affected coal traffic. However, the rate/cost comparisons shown in table 3 below, reflect only those fully allocated costs based on a ton and ton-mile apportionment, since the railroads did not compute fully allocated costs on a dollar basis apportionment in their reply statement.

TABLE 3

Variable and fully allocated costs and ratios of proposed rate to costs

	Proposed rate	Variable cost	Fully Allocated cost (ton/ ton-mile)	Ratio rate/var cost	Ratio rate/PA cost
	(Per ton)	*(Per ton)*	*(Per ton)*	*Percent*	*Percent*
Respondents	$8.64	$6.06	$8.82	143	98
Protestant	8.64	3.31	———	261	———

We have accepted respondents' cost study (with the exception of their computations relative to capital cost considerations) although we have reservations about their treatment of the incremental costs associated with the purchase of new locomotives and waycars. As noted previously herein, protestant's use of rates of return, reflecting the cost of embedded debt, more closely approximates the actual capital "cost" of the carriers. We are unable to precisely restate respondents' costs to reflect the correct rates of return since the formula and workpapers, used by respondents to develop the "return" portion of their costs were not submitted. However, we have developed an estimate of respondents costs using a rate of return of 5.9 percent (simple average of embedded debt rates for SP and AT&SF used by protestant). We applied this factor (5.9 percent) to the return portion of respondents' cost calculations with the exception of the incremental investment costs. In accordance with the San Antonio decision in docket No. 36180, *supra*, we left unchanged that portion of respondents' incremental cost related to plant and track structure improvements. Such cost, herein, was calculated based on an 11 percent aftertax rate for cost of capital. Although respondents' incremental cost, with respect to locomotive purchases, was overstated, as noted previously, we are unable to isolate (from protestant's cost calculations) the amount of this expense properly related to the issue traffic. We have, however, restated respondents' incremental investment in locomotives and equipment to reflect a cost of capital of 7.85 percent, the rate of current Equipment Trust Certificates. We believe the 7.85 percent is more indicative of the "current" embedded debt rate. We should also point out that a higher rate may be allowable based on docket No. 34013, *supra*, not from a cost standpoint, but from a revenue need or allowance for profit standpoint. Our restated variable cost for the subject movement is $5.44 per ton and the fully allocated cost[1] is $6.94 per ton based on a dollar basis apportionment of constant costs. These restatements result in ratio of rate to variable cost of 159 percent and a ratio of rate to fully allocated costs of 124 percent.

In addition to the line-haul freight rate, the railroad's proposed schedule includes a charge of $47 for switching performed at the AEPC plant. Respondents provided no

[1]Respondents' fully allocated cost on a dollar basis was estimated using a ratio of their fully allocated cost (dollar basis) to their variable cost as shown in their opening statement. In that statement, respondents' variable cost of $6.56 was 78.47 percent of its fully allocated cost on a dollar basis ($8.36).

support for this charge. Protestant claims that this charge cannot be justified from a cost standpoint, but has presented no hard evidence to substantiate that claim. We are unable to determine from the evidence submitted whether or not this charge is cost-justified, but we note that protestant has the burden of proof.

VI. CONCLUSION

Costs presented by protestant on the above referenced proceeding are, for the most part, unsupported. From a cost-of-service standpoint, respondents costs are overstated; (1) by their inclusion of excessive rates of return on road property and equipment, and (2) by their assignment of the total incremental investment in locomotives and way cars to the issue traffic. Our restatement of respondents' costs produces a total variable cost per ton of $5.44 and a total fully allocated cost per ton of $6.94 based on a dollar basis apportionment of constant costs. These costs are slightly overstated as explained, herein. The restated costs produce ratios of rate ($8.64) to variable and fully allocated costs of 159 and 124 percent, respectively.

APPENDIX C

Protestant's rate comparisons

Origin	Destination	Tariff reference		Annual volume	Route	Minimum tons per train	Loading time (hours)	Unloading time (hours)	Miles	Rate per ton[1]	Mills per ton-mile	Car ownership
		RR	ICC No.									
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
York Canyon, NM	Kaiser, CA	ATSF	15329	700,000	ATSF	8,400	2	12	1,086[4]	$9.46	8.71	Carrier
Sunnyside, UT	do	DRGW	1246	750,000	DRGW-UP-ATSF	8,400	2	12	811	7.15	8.82	Do.
Colstrip, MT	Cohasset, MN	BN	238	1,750,000	BN	10,000	4	4	773	5.49	7.10	Do.
Dana-Hanna, WY	Kansas City, MO-KS	UP	5711	800,000	UP	9,000	4	10	765	4.84	6.33	Shipper
Gascoyne, ND	Big Stone City, SD	CMSP&P	B-8365	2,000,000	CMSP&P	10,000	4	4	352	2.58	7.30	Do.
Belle Ayr, WY	Amarillo, TX	BN	304	750,000	BN-CS-FWD	10,335	4	4	942	7.49	7.95	Do.
Do	Pueblo, CO	do	178	1,670,000	BN-CS	10,500	4	6	595	4.55	7.65	Do.
Dana-Hanna, WY	Sergeant Bluff, IA	UP	5779	1,100,000	UP-CNW	9,500	4 1/2	5-9	698	4.50	6.45	Do.
Simple average				1,190,000		9,517	3.6	[2]7.4	753	5.76	7.65	

Rebuttal statement

Origin	Destination	RR	ICC No.	Annual volume	Route	Minimum tons per train	Loading time (hours)	Unloading time (hours)	Miles	Rate per ton ([3])	Mills per ton-mile	Car ownership
Belle Ayr, WY	Amarillo, TX	BN	304	750,000	BN-CS-FWD	10,335	4	4	942	7.49	7.95	Do.
Do	do	do	416	1,600,000	BN-KCS	10,500	4	5	875	8.53	9.75	Do.
Do	Fort Gibson, OK	do	380	2,700,000	BN-MP	10,000	4	5	1,142	8.34	7.30	Do.
Do	Jeffrey, KS	do	461	2,000,000	BN-UP	10,600	4	5	704	5.58	7.93	Do.
Do	Metropolis, IL	do	368	2,500,000	BN	10,500	4	4	1,255	9.57	7.63	Do.
Do	Pueblo, CO	do	178	1,670,000	BN-CS	10,500	4	6	595	4.55	7.65	Do.
Do	Welsh, TX	do	419	1,650,000	BN-KCS-LA	10,290	4	5	1,474	10.65	7.23	Do.
Colstrip, MT	Superior, WI	do	348	2,000,000	BN	10,290	4	4	814	6.55	8.05	Do.
Converse, CO	Gary, IN	DRGW	1264	600,000	DRGW-ATSF-EJ&E	9,500	2.5	24	1,465	15.62	10.66	Do.
Cordero, WY	Elmendorf, TX	BN	411	2,700,000	BN-CS-FWD-SP	10,500	4	4	1,653	11.37	6.88	Do.
Dana-Hanna, WY	Kansas City, MO-KS	UP	5711	800,000	UP	9,000	4	10	765	4.84	6.33	Do.
Do	Oak Creek Power Plant, WI	do	5741	750,000	UP-CNW	11,000	4	6	1,165	9.28	7.97	Do.
Do	Sergeant Bluff, IA	do	5779	1,100,000	do	9,500	4.5	5-9	698	4.50	6.45	Do.
Decker, MT	Superior, WI	BN	[illegible]	2,000,000	BN	10,290	4	4	1,029	6.55	6.37	Do.
Gascoyne, ND	Big Stone City, SD	MILW	B-8365	2,080,000	MILW	10,000	4	4	352	2.58	7.30	Do.
Kuehn, MT	Columbia, WI	BN	259	1,900,000	BN-MILW	8,500	4	4	1,068	7.15	6.69	Do.
Do	Superior, WI	do	348	2,000,000	BN	10,290	4	4	837	6.55	7.83	Do.
Carbondale, CO	Kaiser, CA	DRGW	1246	550,000	DRGW-UP-ATSF	8,400	3.5	10	1,047	8.94	8.54	Carrier
Sunnyside, UT	do	do	1246	750,000	do	8,400	2	12	811	7.15	8.82	Do.
York Canyon, NM	do	ATSF	15329	700,000	ATSF	8,400	2	12	1,086	9.46	8.71	Do.
				excess						8.46	7.79	

[1] As of July 15, 1977.
[2] For purposes of averaging, unloading time for movement in line 8 is figured at 7 hours.
[3] As of August 15, 1977.

APPENDIX C

Respondents' rate comparisons (Initial presentation)

Origin	Destination	Tariff	Rate (per net ton)	Miles (mine to destination facility)	Volume (tons)	Mills per ton-mile	Car owner
Gallup, NM	Joseph City, AZ	ATSF 9373-N ICC 15347	$3.74	117	800,000(a)	31.97	Railroad
Do	do	do	3.33	117	1,200,000(a)	28.46	Do.
Do	Casa Grande, AZ	PSFB 100-Q ICC 1970	12.72	662	45,000(b)	19.21	Do.
Do	Snowflake, AZ	ATSF 9373-N ICC 15347	4.39	144	340,000(a)	30.49	Do.
Do	Nelson, AZ	do	7.07	314	160,000(b)	22.52	Do.
Do	Trona, CA	ATSF 15661 ICC 15360	11.77	749	375,000(a)	15.71	Do.
Wingate, NM	Clarkdale, AZ	ATSF 9373-N ICC 15347	7.07	315	100,000(b)	22.44	Do.

(a)—minimum annual volume published in tariff
(b)—actual or projected annual tonnage

APPENDIX D

31093

INTERSTATE COMMERCE COMMISSION

No. 36608

INCENTIVE RATE ON COAL—CORDERO, WYOMING TO SMITHERS LAKE, TEXAS

Decided November 28, 1977

Proposed capital incentive rate schedule found qualified for consideration under section 15(19) of the Interstate Commerce Act. Proposed rates found lawful in part.

Jack W. Arlitt, C. Michael Loftus, and *William L. Slover* for protestant.

Curtis H. Berg, Harry L. DeLung, Jr., Richard M. Gleason, Harvey Huston, R. Eden Martin, Milton E. Nelson, Jr., Howard J. Trienens, and *Richard J. Metzgar* for respondents.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This proceeding is brought under section 15(19) of the Interstate Commerce Act [as revised by section 205 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (the 4R Act)], in accordance with the procedures set forth in regulations (49 CFR 1109.20, *et seq.*) adopted in Ex Parte No. 327, *Rate Incentives for Capital Investment,* 353 I.C.C. 760 (1977). Due and timely execution of our functions under section 15(19) of the act imperatively and unavoidably requires the omission of an initial decision in this proceeding. Requested findings and evidentiary rulings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the appropriate disposition of the proceeding.

Pursuant to section 15(19) of the act, respondents Burlington Northern, Inc., The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company, and The Atchison, Topeka and Santa Fe Railway Company filed a notice of intent to file schedules setting forth a new capital incentive rate applicable to

transportation of coal in unit-train shipments from Cordero, Wyo., to Smithers Lake, Tex., subject to a minimum volume of 4 million tons per year.[1] Respondents' proposed rates are $15.60[2] per net ton (subject to an escalation formula) and $16.54 per net ton (subject to general rate increases rather than the escalation formula) for unit-train movements in shipper-supplied cars. No separate rate is proposed for carrier-owned cars. The proposed transportation would be via Burlington Northern and its subsidiaries Colorado and Southern and Fort Worth and Denver (hereinafter collectively referred to as BN) from Cordero, Wyo., to Fort Worth, Tex., and by Santa Fe from Fort Worth to Smithers Lake, Tex. The total distance is 1,607 miles—1,308 miles via BN and 299 miles over lines of the Santa Fe.[3]

Affidavits accompanying the respondents' notice of intent indicate that respondents anticipate that the following capital investments are required to implement the proposed schedule:

Burlington Northern System share of locomotives and related equipment	$27 million
Improvements and increased maintenance of Burlington Northern track structure	1 million +
Construction of new rail line from Cordero to the Jacobs Ranch Mine of Kerr-McGee Corp. in Campbell County, Wyo.	1 million +
Santa Fe share of locomotives and related equipment	9 million +

Protestant Houston Lighting & Power Company (HL&P) is an electric utility serving the Huston, Tex., area. It has nearly completed, at a total cost of almost $500 million a new coal-fired generating facility at Smithers Lake, Tex. The utility has a long-term coal supply arrangement with the Shell Oil Company for this facility to be provided from Shell's Young's Creek Mine near Decker, Mont. Since this mine is not yet productive, HL&P intends to obtain at least 12,700,000 tons of coal from the Jacob's Ranch Mine of Kerr-McGee Corporation, near the Cordero origin point named in respondents' proposed schedule. Since HL&P is the only receiver of coal in Smithers Lake, Tex. (the only designated destination), it is clear that the proposed schedule is designed to apply to the movement of its coal.

[1]Respondents also proposed an alternative rate based upon a minimum of 105 cars per shipment in the event the minimum annual tonnage requirement is not met.

[2]The original rate in respondents' proposal filed on June 3, 1977, was $14.18 per net ton subject to escalation on July 1, 1977. Under the escalation formula the proposed rate became $15.60 on July 1, 1977. The evidence of record has been specifically addressed to this latter level.

[3]The proposed schedule is set forth in appendix A.

HL&P filed a protest to the proposed schedule, as set forth in respondents' notice of intent, on July 22, 1977. Pursuant to its obligations under section 15(19) of the act, the Commission instituted an investigation and ordered that the modified procedure set forth in Ex Parte No. 327, *supra,* be followed. The following pleadings were submitted by the parties: an initial presentation of protestant, respondents' reply statement, and protestant's rebuttal statement of fact and argument.

The parties are in substantial disagreement on five major issues: (1) whether the proposed schedules qualify for treatment under section 15(19); (2) whether respondents have market dominance over protestant's coal traffic; (3) the proper method for computing the cost of service and the weight that should be accorded cost evidence in determining maximum reasonableness of rates; (4) the validity of allegedly comparable rates presented by both parties as a basis for determining maximum reasonable rates; and (5) the lawfulness of other conditions of the proposed tariff, including an escalation formula and respondents' failure to offer service in carrier-supplied cars.

Positions of the Parties

(a) *Do the proposed schedules qualify for treatment under section 15(19) of the act?*—Protestant contends that the proposed schedule should be rejected by the Commission because respondents have failed to establish the threshold requirement for treatment under section 15(19) of the act: that a capital investment of $1 million or more is required to implement the proposed schedule. Protestant concedes that although it has the burden of proof on the lawfulness of the proposed schedule,[4] respondents must be considered to have the initial burden of establishing the validity of the capital investment, and protestant contends that they have not done so. Rather, protestant argues that the anticipated capital investments do not have a sufficient "identifiable effect" upon the HL&P traffic to satisfy the Ex Parte No. 327 requirement of a "nexus between the investment and the implementation of the proposed schedule." 353 I.C.C. 760,765.

With respect to the alleged need for new locomotives which accounts for the vast majority of respondents' anticipated capital investment, protestant alleges that the proponent carriers maintain a

[4]See Ex Parte No. 327, *supra,* 353 I.C.C. at 773.

large fleet of locomotives to provide the power needed to fulfill their statutory common carrier service obligation. The fact that new locomotives must be purchased from time to time does not mean that the new traffic which happens to be added at these times should be treated as causing these expenditures for purposes of section 15(19). Protestant notes that an exclusive dedication of these locomotives would be a violation of common carrier duties. Testimony, based upon a field study of another unit-train service, is offered to show that the railroads' general practice has been to utilize any individual locomotive or groups of locomotives in whatever service would best satisfy the overall needs of the system, rather than exclusive dedication of locomotives to particular coal unit-train service. Protestant concludes that this is not the type of direct relationship between an investment and a proposed rate which is required by section 15(19) and that if such an investment were accepted for this purpose, rates on virtually every volume movement of any commodity could be filed under the capital incentive rate statute.

With respect to improvements and increased maintenance of track which respondents indicate will account for "substantially in excess of $1 million" of the anticipated capital investment, protestant maintains that any expenditures relating to maintenance of roadway are properly considered operating expenses rather than capital investments. Insofar as improvements to track are concerned, protestant offers testimony that the track structure between Cordero and HL&P's new plantsite is fully capable of handling the additional unit-train movements in its present condition, without any improvements. Protestant maintains that respondents' projected improvements will benefit all system traffic and that respondents have failed to establish, on any justifiable basis, the amount of such investment which is attributable to HL&P's coal traffic. Specifically, protestant alleges that respondents' method of allocating portions of the incremental investment to HL&P, based upon coal tonnage projections, is unsupported because workpapers and records which would substantiate the projections have not been entered in evidence.

Protestant concedes that respondents' proposed investment in construction of a new rail line to the Kerr-McGee coal mine in Campbell County, Wyo., comes closest to qualifying as an investment within the purview of section 15(19). However, protestant notes that the line is in fact a portion of a new line which was approved by the Commission in Finance Docket No. 27579,

Burlington Northern, Inc.—Construction and Oper., 348 I.C.C. 388 (1976). Since evidence in that proceeding indicates that traffic moving over the new trackage could exceed 100 million tons per year by 1980 and eventually reach a level of 300 million tons annually, protestant argues that the track being constructed to the Jacobs Ranch Mine will be moving a tremendous volume of traffic for a great number of shippers. Since HL&P will ship less than 13 million tons of coal from this origin, it is contended that the proposed capital investment does not have a sufficiently close relationship to the proposed new schedule to warrant treatment under section 15(19).

In reply, respondents state that they are required to purchase 69 locomotives and an additional number of cabooses because of the new HL&P movement, for a total capital investment of over $30 million for BN and over $9 million for Santa Fe. Respondents observe that HL&P specifically acknowledged locomotive purchases in its computation of variable costs (albeit at a figure of 65 rather than 69 locomotives).[5] Respondents contend that there is no requirement that equipment be exclusively dedicated to a particular shipper or service in order to qualify for treatment under section 15(19). They argue that the Commission has recognized that new unit-train coal service requires the purchase of new locomotives in *San Antonio, Tex.* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976), affirmed *Burlington Northern* v. *United States*, 555 F. 2d 637 (1977), wherein we included the cost of additional locomotives and cabooses, required because of coal traffic to San Antonio, when we calculated the variable cost of providing that service.

Although respondents make no reply to protestant's contention that increased maintenance is properly an expense rather than capital investment, they contend that plant upgrading and expansion attributable to the HL&P movement exceeds $1 million and itself satisfies section 15(19). Respondents argue that the capital investment funds in this category are not for the purpose of restoration (which, according to our interpretation of section 15(19), could not ordinarily serve as the basis for a capital incentive rate),[6] but rather will substantially upgrade and improve the line to handle the new volume coal traffic. While respondents concede that

[5]In its reply, protestant claims that it was not conceding that 65 new locomotives would actually be used in its coal service, but only that the railroads' locomotive pool should be credited with 65 locomotives for costing purposes

[6]See Ex Parte No. 327, *supra*, at 764.

other volume coal movements also contribute to their need to upgrade main-line track (*e.g.*, use of new heavier rail and new communications systems), that fact does not preclude the capital investment attributable to HL&P's traffic from being considered under section 15(19).[7] Respondents again point to the *San Antonio* case, *supra*, where we attributed the cost of plant expansion to the specific coal traffic under consideration there.

(b) ***Market dominance.***[8]—Protestant maintains that respondents clearly have market dominance over the traffic subject to their proposed schedules. Three presumptions set forth in 49 CFR 1109.1(g)[9] are cited as applicable to the instant movement:

(1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year ***.

(2) Where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and

(3) Where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.

With respect to the market share presumption, protestant observes that while there has been no traffic moving between the named origin and destination to date, BN is the only carrier able to provide rail service at the mine from which HL&P's coal will be moving and the Santa Fe is the only carrier serving HL&P's new plantsite. The presumption relating to variable cost of the service is also applicable according to the variable cost calculations submitted by protestant. The substantial investment presumption is made applicable by HL&P's investment in cars to haul the coal and investment in its generating plant at Smithers Lake.

Respondents deny that they have market dominance over HL&P's coal traffic under criteria established by the Commission. Respondents argue that the first presumption of market dominance cited by protestant cannot apply since there has been no traffic at all moving between the named origin and destination. On the basis of cost evidence submitted by respondents, the second presumption

[7] In respondents' cost calculations, only a portion of these costs are allocated to the HL&P traffic.

[8] Section 202(b) of the 4R Act (section 1(5)(b) of the Interstate Commerce Act) requires a finding of market dominance as a prerequisite to a Commission finding that a rate exceeds a just or reasonable maximum for the service rendered.

[9] In Ex Parte No. 320, *Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976*, final report served October 1, 1977, we promulgated rules for determining market dominance.

relating to the variable cost of service is not applicable either. Respondents concede that HL&P has made a substantial investment in rail-related equipment facilities and has entered into a long-term contract for coal at the point of origin, but contend that the presumption of market dominance created by these investments is irrational and inconsistent with section 1(5)(b) of the act. Moreover, respondents contend that any presumption of market dominance is rebutted by HL&P's careful consideration of competitive coal sources and originating and terminating carriers before deciding on its coal supplier and the location of its plant. Respondents contend that the proposed capital incentive rates (escalated to reflect cost increases) are the same as those offered to HL&P in that competitive environment. Moreover, respondents assert that the fact that Southern Pacific also serves Houston rebuts any presumption of market dominance.

In reply, protestant reiterates that the amounts expended by HL&P for trackage and unloading facilities at its Smithers Lake plant, in addition to freight cars which it has already acquired, clearly establish the applicability of the substantial investment presumption of market dominance. The rational of the presumption is that if a shipper has made substantial investment in rail-related equipment which cannot easily be disposed of, it will be committed to rail transportation and defenseless against predatory pricing. Protestant maintains that this case is a perfect example of the type of situation to which this presumption was intended to apply.

Protestant disputes the contention that its prior negotiations for other sources of coal supply indicate a present competitive transportation market. It notes that this issue was fully considered in Ex Parte No. 320, *supra*, when the Commission rejected respondent's broad view of the relevant market and focused on present competitive circumstances.

(c) ***Lawfulness of the proposed rate—cost of service, revenue need, and cost of capital.***—Protestant has analyzed the cost to the respondent railroads of hauling HL&P's coal.[10] Protestant made field surveys of the terminal and line-haul facilities over the route and analyzed the operating characteristics of the movement. Using costing techniques approved by the Commission in ***Rules to Govern Assembling & Presenting Cost Evidence***, 337 I.C.C. 298 (1970), and the Rail Form A[11] formula (with some adjustments) protestant determined the variable cost of providing the service to be $8.61 per

[10] The parties' cost evidence is set out and discussed more fully in appendix B.

[11] I.C.C. Statement No. IFI-73, "Formula for Use in Determining Rail Freight Service Costs."

net ton or $904.41 per carload. At a variable cost of $8.61 per ton, protestant observes that HL&P's contribution over variable cost would amount to $6.99 per net ton at the proposed rate of $15.60, or almost $35 million per year. Protestant concludes that level of contribution over variable costs is unconscionably high.

As detailed more fully in appendix B, protestant made several assumptions in its calculation of variable costs that have proved particularly controversial. In calculating the operating factors of the HL&P movement, protestant used a figure of 65 locomotives (4 less than respondents' assertion). Secondly, the cost of locomotives and certain fixed plant investment is not allocated directly to HL&P. Instead, system average costs are adjusted (as to locomotive and waycars only) and the cost of serving HL&P then recomputed using the adjusted system averages. Thirdly, and most significantly, protestant's analysis applied cost of capital rates of approximately 5.5 percent for BN and 6.1 percent for Santa Fe. Those rates reflect the embedded cost of debt only, and give no weight to the current higher cost of equity capital.

Respondents' defense of the proposed rates is premised on the new standards for railroad ratemaking set forth in the 4R Act. Respondents cite congressional recognition of the inadequate financial condition of the railroads and state that the principal purpose and effect of the 4R Act is to allow the railroads greater flexibility in setting rates which produce an adequate return and permit the raising of capital. Respondents place particular emphasis on section 205 of the 4R Act which directs that the railroads be permitted to earn "a fair, reasonable, and economic profit or return (or both) on capital employed in the business ***" and that revenue levels should "permit the raising of needed equity capital." Respondents claim that unless these statutory provisions are fully implemented, the railroads will be unable to make the investments in plant and equipment which are necessary to implement the President's National Energy Plan which calls for the ready availability of huge volumes of coal and railroad facilities to haul that coal. Respondents argue that the railroads must raise billion of dollars for new capital investments over the next decade for plant and railroad equipment and a significant portion of that capital is required by the increasing use of coal as an energy source. Respondents state that they will make in excess of $70 million in capital expenditures attributable to the movement of coal to Houston involved in this case.

Respondents offer voluminous testimony on the financial condition of the railroad industry in general and the Santa Fe and BN in particular to show that there is need for additional revenues to attract capital so that adequate and efficient railway transportation service will be available in the future. Proffered testimony indicates that the cost of capital to the railroads is far greater than it was 10 or 20 years ago because of inflation, higher interest rates, and increased demand for capital by the Government and other borrowers. In addition, low profitability and consequent risk to investors has so increased the cost of capital that certain markets are vitually forclosed to the railroads. Numerous recent decisions wherein we have recognized the weak financial position of the industry are cited.

Respondents contend that their roads, during the period 1970-1976, experienced little or no gains in net income, totally inadequate earnings margins, and increasing shortfalls between cash flows from operations and capital expenditures. Evidence introduced by respondents indicates that the BN's ratio of Net Railroad Operating Income (NROI) in 1976 relative to net investment was 2.6 percent and the Santa Fe's 3.5 percent—lower than in any of the 5 preceding years.

Under these circumstances, respondents contend, a cost of capital rate of 5.5-6.1 percent (the embedded cost of debt used by protestant in its cost evidence) would condemn the railroads to a future in which they would be unable to attract needed capital as contemplated by the 4R Act. In support of the claim testimony was presented by respondents on the current cost of capital. Respondents' witnesses determined the cost of capital separately for debt and equity and adjusted the components to produce a weighted cost. Using debt cost in the range of 5.5-8.5[12] percent and equity in the range of 14-16 percent, respondents conclude that their total cost of capital exceeds 11 percent. By contrast, respondents assert that HL&P's use of 5.5-6.1 percent is directly contrary to financial fact and would be confiscatory.

In order to demonstrate what respondents refer to as the obvious inequity of HL&P's position with respect to cost of capital, respondents have introduced into evidence excerpts from the transcript of a hearing held by the city of Houston on an application by HL&P for an increase in its own electric rates. Respondents note

[12]Embedded debt costs and current debt cost, including the current rate on equipment trust certificates, were considered in respondents' evidence.

that in that hearing it was HL&P's position that needed investment capital cannot be raised without an adequate rate of return which gives effect to current costs of equity capital and argued for a rate which would produce in excess of a 17-percent return on equity investment. Testimony from that hearing by an HL&P witness expressly recognized that the railroads are in a weaker financial condition than electric companies. In light of the position taken by HL&P in the context of its application for a rate increase, respondents assert that it is unconscionable for HL&P—a highly profitable, soundly financial utility with a monoply service market—now to advocate that railroads be allowed only a 5.5-6.1 percent cost of capital in determining the rate for transportation of coal to HL&P's generating station.

It is respondents' position that it is inappropriate to base rates solely on costs because individual rates need bear no relationship to costs, either variable or fully allocated. Respondents observe that the Commission has ruled that contributions above variable costs which particular rates should make will vary with demand for, and value of the service provided. Moreover, respondents point out that much railroad traffic must move at rates below fully allocated cost because of competition. Therefore, if a railroad is to earn an overall return which covers its full costs, it must be allowed to set many rates well in excess of their full-cost level where competition, market conditions, and demand permit. For example, respondents point out that because wheat constitutes such a large portion of the Santa Fe's traffic and because rates on wheat are depressed and moving at little over variable cost because of truck competition, coal must contribute relatively more toward systemwide revenue needs.

Notwithstanding respondents' objection in principle to the use of cost evidence in determining rates, they have introduced their own study, in reply to protestant's cost evidence, which sets variable costs at a figure of $12.65—$4.04 higher than protestant's variable cost computation of $8.61. Respondents also submitted fully allocated cost figures of $19.83 based on the ton and ton-mile method and $16.96 based on the ratio method. Respondents contend that the principal error made by HL&P is assuming that capital costs are equal to embedded debt costs. A second alleged error in HL&P's costs relates to its treatment of the additional investment in locomotives and track restructuring which the railroads must make in order to handle this coal traffic. Respondents assert that the costs of such incremental investment—such as

depreciation and capital cost of new locomotives and other equipment which will be used in the unit-train service—should be borne by the coal shippers rather than simply added to railroads' systemwide costs to produce slightly higher system averages. Respondents stress that they have apportioned only a part of the costs of this incremental investment to HL&P traffic, while the remainder is allocated to other coal traffic. By contrast, respondents assert that HL&P's method could result in shippers of commodities other than coal having to bear part of the costs of new investment required solely in order to serve HL&P and other coal shippers.

Respondents contend that the alleged ratios of the proposed rates to variable and fully allocated costs are plainly reasonable and note that even if protestant's variable cost figure of $8.61 per ton were used, the $15.60 rate is 181 percent of that variable cost. Citing recent Commission decisions including docket No. 36114, *Potomac Electric Power Co.* v. *Penn Central*, 356 I.C.C. 815 (1977), respondents contend that the Commission has upheld coal rates exceeding 200 percent of variable cost. Moreover, 200 percent of protestant's variable cost of $8.61 would produce a rate level of $17.22—a rate which exceeds both of respondents' proposed rates.

In rebuttal, protestant attacks respondents' cost evidence as contrary to accepted costing methodologies and theoretically unsound. Protestant attributes the large disparity between the variable costs of the two parties to respondents' use of an additive which incorporates into variable costs a profit-oriented rate of return on common equity and another additive which establishes the investment in locomotives and roadway through an unwarranted incremental theory of determining the carrier's investment in equipment and roadway property. *Rules to Govern Assembling & Presenting Cost Evidence, supra*; docket No. 35404, *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977); and Ex Parte No. 290, *Procedures Governing Rail General Increase Proceedings*, decided September 28, 1977, are cited for the proposition that profit may not be considered in computing variable cost. *Rules to Govern Assembling & Presenting Cost Evidence, supra*; *Lumber from Decatur, Ala., to Gulf Ports*, 226 I.C.C. 164, 165 (1938); and *Traffic Bureau of Merchants Exchange* v. *S. P. Co.*, 19 I.C.C. 259, 261 (1910) are cited as being contrary to respondents' incremental investment additive. Moreover, protestant asserts that these additives are theoretically and practically unsound and devoid of legal justification under the 4R Act.

Protestant's position is that costing methodologies advocated by respondents are properly the subject of rulemaking currently being considered by the Commission in Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, rather than in the context of this individual rate case.

With a disclaimer that it does not believe that it is proper to utilize a rate of return additive in determining variable costs, protestant has introduced its own computation of variable costs using an after-tax rate of return of 8 percent (a rate which protestant deems more reasonable than the 11 percent used by respondents) and an approximation of the effective tax rate rather than a flat statutory tax rate of 48 percent. Protestant's computation on this new basis yields variable costs of $9.13 per net ton. In addition, protestant introduced an analysis of respondents' proposed rates based on the application of the so-called Discounted Cash Flow Methodology to the respondents' claimed incremental investment. The results of that analysis demonstrate, in protestants' view, the extremely high internal rates of return which would accrue to respondents on the incremental investment utilizing either HL&P's variable costs or those of respondents.

(d) *Lawfulness of the proposed rate—comparability.*—Protestant introduced a study of major traffic and operating characteristics of 11 movements which are allegedly comparable to the subject traffic. Protestant indicates that the average rate on these movements is 7.37 mills per ton-mile on an average annual volume of 1,500,000 tons. The rate here proposed by the carriers ($15.60) produces 9.71 mills per ton-mile for movement of 5 million tons per year.

In addition, protestant introduced a second study describing the major traffic characteristics of six coal movements originating at or near Cordero, Wyo., and moving southbound over all or a portion of the rail route to Houston.[13] These movements, allegedly extremely similar to the HL&P traffic,[14] earn average revenues of 7.5 mills per ton-mile. The highest of these rates earns only 7.95 mills per ton-mile. Protestant asserts that on the annual volumes here involved, these disparities amount to $17,746,300 and $14,132,800. Protestant notes that the HL&P traffic is far more desirable from the carriers' viewpoint, on the basis of average data relating to the transportation characteristics of the compared movements.

[13] See appendix C.

[14] Each movement originates in the Powder River Basin of Wyoming; each travels some portion of the proposed HL&P route; each involves unit-train service in shipper-owned cars; each involves a high annual volume traveling over a long distance involving a similar size train; and each is subject to comparable loading and unloading time restrictions.

On the basis of this comparative rate evidence, protestant contends that the proposed rate is so grossly out of line as to be unjust and unreasonable and constitutes an undue and unreasonable prejudice, disadvantage and discrimination in violation of section 3(1) of the act.

In reply, respondents allege that these rates relied upon by HL&P were implemented or negotiated at a time when the railroads were attempting to develop the coal transportation market in the West. Price and demand for coal were relatively low. Competitive factors, including alternative fuels and other modes of transportation were different. As a result, respondents state that the only way coal could move by rail in volume was to quote rates which made only a relatively small contribution to fixed costs and return requirements. Respondents claim that they have sought and are seeking to renegotiate many of these rates which they deem at the low end of the zone of reasonableness.

Respondents state that the need today is less to stimulate new volume coal movements than to raise capital necessary to enable the railroads to handle those movements. They indicate that while the mine-head price of coal has tripled since 1970, the demand for coal and its transportation has increased because of the even more rapid increases in the price of other fuels. Accordingly, respondents suggest five recently implemented rates which allegedly provide a valid basis for comparison.[15]

In addition, respondents argue that any reliance on rate comparisons must be measured against the provisions of the 4R Act, the purpose of which was to effect change by breaking the pattern of past practices, increasing the range of managerial discretion, and enabling the railroads to move to a healthier financial condition. Therefore, respondents argue, even if it were concluded that lower rates made or negotiated prior to the 4R Act are or were comparable to the instant proposal, that fact should not be permitted to frustrate congressional policy with respect to new rates.

In response to protestant's claim that the proposed rates are discriminatory under section 3(1) of the act, respondents cite the *San Antonio* case, *supra*, wherein we found a similar unsubstantiated claim to be without merit.

In response to respondents' allegation that the rates offered by protestant are not truly comparable because they are outdated, protestant offers evidence that all but one of the tariffs on the

[15] See appendix C.

movements were issued within the last 2 years. Protestant challenges the validity of respondents' rate comparisons on grounds that two of the tariffs contain single-car (rather than unit-train) rates, one is the product of a poor negotiating position of the shipper, another provides excessive free time for unloading not compatible with unit-train service, and the last (the Amsterdam rate) is, in protestant's view, above a maximum reasonable level.

(e) *Lawfulness of other provisions of the proposed tariff—escalation formula, shipper-owned cars.*—Protestant contends that the escalation formula contained in the proposed schedule[16] violates section 6(6) of the act and rule 4(i) of Tariff Circular 20 (49 CFR 1300.4(i)(1)) which require that a tariff contain an explicit statement of the applicable rate. Protestant asserts that it is impossible to determine the information needed to apply the formula from the face of the tariff. In addition, protestant points out that the proposed schedule vaguely provides that "[a]ny cost increases caused by new government regulations (except federal income taxes) will be added directly to the rates." Protestant concludes that the proposed escalation formula violates Tariff Circular 20 in that there is no explicit statement of the rates which would apply.

Protestant argues that the escalation provision also violates section 6(3) of the act because it can effect changes in the rate without the required publication and notice. In effect, protestant argues, the escalation formula is an unlawful device to impose contract rates, preempting Commission jurisdiction over changes in the freight rate level for a period of 5 years under section 15(19). Moreover, the wide disparity between the escalating rate ($15.60 as of July 1, 1977) and the nonescalating rate is, in protestant's view, designed to coerce the shipper into utilizing the escalating rates and therefore constitutes an unjust and unreasonable practice.

Protestant also attacks the proposed schedule because it fails to offer rates for application to carrier-owned cars.[17] It is contended that this failure violates the carriers' duty to provide safe and adequate car service. Protestant argues that even where the practice has been for some shippers to supply their own cars the carrier's obligation to provide cars is unaffected.

Protestant further alleges that respondent's restriction of their proposed schedule to transportation in shipper-owned equipment, while holding out such service to other coal unit-train shippers obtaining coal supplies in the same area, violates sections 1(6) and

[16] See appendix A, item 155.
[17] See appendix A, item 130.

3(1). Docket No. 36114, *Potomac Electric Power Co.* v. *Penn Central*, 356 I.C.C. 815 (1977), cited by respondents, is distinguished on the basis that in that case there was no evidence of other shippers being accorded unit-train rates in carrier-furnished cars.

In response to protestant's allegation that its escalation formula is unlawful, respondents point out that they have not actually filed rate schedules, but have only filed a notice of intent to file rate schedules under section 15(19). They contend that since the notice of intent sets forth a rate in dollars and cents applicable at the time the notice was filed and states a formula by which the rate would be increased on July 1, 1977, and succeeding years, there will never be uncertainty as to the currently applicable rate. If the Commission finds that the proposed rate is not unlawful, respondents state that they will promptly file tariff schedules in compliance with section 6 and 49 CFR 1304(i)(1).

In response to protestant's contention that the proposed schedules unlawfully condition the rate proposals on HL&P's acceptance of the escalation formula, respondents point out that two alternative rates—one subject to escalation, and the other subject to general rate increases—are proposed. Respondents contend that the difference between the two rate alternatives is justified because escalation would protect the railroads from delays and risks inherent in seeking general rate increases. Moreover, respondents argue that escalation provisions are not unreasonable because many shippers, including utilities, have entered into such agreements with the railroads.

In response to protestant's charge that respondents' failure to propose rates applicable to carrier-supplied cars violates section 1(11) of the act, respondents argue that the issue is moot because HL&P willingly contracted to buy cars in February 1977. Recent Commission decisions, including *San Antonio, supra*, and *Potomac Electric Power Co.* v. *Penn Central Transportation Co., supra*, upholding tariffs applicable exclusively to shipper-supplied cars are cited. Respondents state that docket No. 35404, *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977), does not hold that a carrier is obligated to supply where a shipper's supply is entirely adequate.

Discussion and Conclusions

Section 15(19) permits a common carrier by railroad to file a proposed capital incentive rate schedule "whenever the

implementation of the proposed schedule would require a total capital investment of $1 million or more ***." As a preliminary matter, we agree with protestant's contention that while the burden of proof as to the lawfulness of a proposed capital incentive rate lies squarely with protestant, establishing the existence of the necessary capital investment is a jurisdictional matter which must first be established before the Ex Parte No. 327 procedures become applicable. In a capital incentive proceeding, the proposed schedule is not entitled to consideration under the Ex Parte No. 327 procedures unless there is a sufficiently identifiable effect on the involved traffic to establish a nexus between the investment and implementation of the proposed schedule. Since the Ex Parte No. 327 procedures are a unique departure from traditional ratemaking procedures, it is obvious that the proponent railroad must first establish that it is entitled to their use. Once this is done, however, it is clear that the burden of proof on the merits of the proposed schedule (including the issue of market dominance) is on the protestant, since a proposed capital incentive rate would otherwise become effective automatically absent a prior Commission finding of unlawfulness.

Contrary to protestant's contention, respondents' evidence regarding the purchase of locomotives for the proposed service satisfies the requirement of a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Interpreting the language of section 15(19), we have made the following comments:

> Section 15(19) provides incentive for large-scale investment made pursuant to a single, verifiable plan. A schedule proposed under the section must relate closely to such investment. Thus, the investment should have a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Ordinarily, eligible capital investment will be for the purpose of promoting innovative or improved service or attracting new traffic. Investment devoted to the preservation of existing levels of service, as for the repair or maintenance of a railroad's general equipment and facilities, in most instances could not be associated with a particular rate modification or new rate; such investment would not be within the purview of section 15(19). [353 I.C.C. 760, 764.]

Since it is clear that the usual practice of railroads offering coal unit-train service is to pool available locomotive power rather than dedicate particular locomotives to a particular service, we do not believe that the total cost of 65 new locomotives should necessarily be considered as qualifying the proposed schedule for capital incentive rate treatment. While we reject an interpretation of

section 15(19) that would make "dedication" of plant or equipment (which is the subject of the capital investment) a prerequisite to treatment under section 15(19), there must be a proper allocation between existing and new equipment and a showing that the additional locomotive power is needed for the new service rather than for the carrier to fulfill its statutory obligation. However, in view of the cost of locomotives (in excess of $500,000) and the large number involved here, the threshold requirement of $1 million is clearly met.[18] According to the carriers, over $34 million will be spent on locomotives; it seems reasonable to conclude that at least one thirtieth of their work will be directed toward providing the unit-train service in question.

We believe that a portion of respondents' proposed capital investment for upgrading and expansion of plant attributable to the HL&P movement also qualifies the proposed schedule for capital incentive rate treatment. In this regard, we stated in Ex Parte No. 327, *supra*, at 764-65:

> A shipper, or, for that matter, a railroad investment devoted to rebuilding the main line of a rail line served by many originating or terminating shippers could not ordinarily serve as the basis for rate modifications affecting the multitude of traffic over the main line.
>
> * * * * * * *
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> The distinction drawn between [capital investments involving specific traffic and rates applicable thereto of the railroad(s) on whose lines the investment takes place and capital projects that affect the general run of the investing railroad(s) business] is a relevant one. We agree that systemwide rate modification predicated upon major investment affecting traffic generally was not contemplated as within the scope of section 15(19). The expedited procedures prescribed in section 15(19) and in the regulations herein adopted were not intended to accommodate a proceeding in the nature of a general rate increase. Only capital investment projects having an identifiable effect upon specific traffic would satisfy the requirement of a nexus between the investment and the implementation of the proposed schedule.

Protestant's witnesses state that HL&P's coal unit-train traffic could move tomorrow without improvements and that any new improvements would benefit all system traffic. We find respondents' position on the need for upgrading main line roadway to accommodate HL&P's heavy, high volume coal unit-trains more credible. However, the issue here is whether the respondents have demonstrated that a portion of the incremental investment in

[18] We have recognized elsewhere that new unit-train coal service requires additional locomotives and cabooses. See, *e.g.* *San Antonio*, *supra*, at 415.

upgrading and expansion of their plant—concededly investment that will benefit all "new" large-volume coal traffic moving over respondents' lines in the future—can be attributed specifically to the HL&P movement to establish "an identifiable effect" upon that traffic and establish a nexus between the investment and implementation of the proposed schedule. Respondents have made such an allocation (including only current 1976 and 1977 expansion costs), based upon projected gross tonnages of high-volume unit-train coal movements.[19] Protestant contests the basis of that allocation, arguing that the gross tonnage projections and the allocations of those tonnages among new coal shippers including HL&P is unsupported by evidence of record.

Nevertheless, respondents' allocation does not appear to be unreasonable. Even allowing for imprecisions in the basis of that allocation, we find that respondents have adequately demonstrated that far in excess of $1 million can be fairly allocated to the HL&P movement.

In summary, we believe that the magnitude of the proposed movement of coal and concomitant capital investment involved here clearly establishes that the schedule is qualified for capital incentive rate treatment. Unit-train movements of smaller dimensions may warrant closer scrutiny of the connection between the proposed capital investments and schedules.

Since the only challenge[20] to the proposed capital incentive rates is that they exceed a maximum reasonable level, section 1(5)(b) of the act requires that a finding of market dominance be made before the rates can be held to exceed a maximum reasonable level.

To aid in making determinations as to market dominance, we have established the three rebuttable presumptions of market dominance cited by protestant. In our interim report in Ex Parte No. 320, served August 23, 1976, we noted, at page 99, that the essential question was "whether there exist sufficient commerically feasible and reasonably available transportation alternatives from other *** carriers or modes to insure that a rate increase by any competing carrier will result in more than a de minimus diversion of demand for transportation service during the period in which the rate in issue will be in effect." In both the interim report and the final

[19]See appendix D.

[20]Although protestant has alleged that the proposed schedule would unlawfully discriminate against it, no supporting evidence is presented. General declarations as to competition or injury unsupported by evidentiary facts will not support a finding of discrimination or undue preference or prejudice under section 2 or section 3(1) of the act.

report, served October 1, 1976, in Ex Parte No. 320, we stressed that the presumptions are not the exclusive means of proving market dominance.

Accordingly, although the market share presumption is literally inapplicable to new movements, the fact that all of the subject traffic will be handled by the respondents is clearly an important factor. No evidence has been presented which would indicate that respondents will control less than 70 percent of the market from Cordero to Smithers Lake once actual movements commence. We reject respondents' contention that the past competitive circumstances surrounding other possible sources of coal should be considered. While the decision to ship from the Jacob's Ranch Mine may well have been arrived at in a competitive atmosphere, once protestant made that commitment and agreed to a supply contract it could not change origins. This being the case, "market competition" provides little protection to the shipper if the railroads were to attempt to exact an unreasonably high rate.

There is no dispute that BN is the only carrier which is able to provide rail service to the mine and that the Santa Fe is the only carrier serving HL&P's plantsite. In addition, protestant has purchased specially designed freight cars to transport the coal. Although no information has been submitted concerning the ease or difficulty with which these might be disposed of if protestant wished to switch to another mode, the evidence clearly establishes that no rail competition exists and the heavy-loading characteristics of the coal traffic as well as the location of the mine makes competition from any other mode not feasible. The mere speculation that a coal slurry pipeline might someday be built is not sufficient unless the threat becomes an impending reality. We cannot say that this evidence of potential competition is sufficient in the absence of concrete evidence that actual steps have been taken toward its institution. Accordingly, we find that respondents have market dominance over the issue traffic.

In determining the lawfulness of rates, we will give consideration to comparisons with established rates on the same commodity transported in the same or similar territories under like circumstances. Both parties have submitted evidence of allegedly comparable rates on coal moving in high-volume unit-train service to electric generating facilities. These rates,[21] with selected data, are set out in appendix C.

[21]Only six of numerous rates introduced by protestant are included in appendix C. These six are viewed by protestant as "extremely comparable" to the HL&P movement.

Five of protestant's six[22] most comparable rates appear to present a valid basis for comparison in terms of origin, route of movement, car ownership, high annual volume, distance, tonnage per train, and loading and unloading time. The average rate of 7.6 mills per ton-mile is 2.1 mills lower than 9.7 figure for the proposed rate. However, respondents' contention than protestant's allegedly comparable rates are either depressed or outdated, or both, cannot be ignored. In *Burlington Northern, Inc.* v. *United States,* 555 F. 2d 637 (1977), the Court rejected a similar claim by the carriers because it was unsupported in the record. In this proceeding, respondents have introduced voluminous testimony on the impact of inflation on railroad costs, the increased value of coal in recent years as an energy source, the increased demand for its transportation, and the resultant change in competitive factors which affect negotiations for transportation rates. Specifically, respondents have produced evidence that the base rates on four of protestant's comparative rates (to destinations in Pueblo, Colo.; Amarillo, Tex.; Welsh, Tex.; and Jeffrey, Kans.) were negotiated prior to the OPEC oil embargo and the energy crisis of late 1973 and 1974,[23] developments which have enhanced the attractiveness (and price) of coal as an energy source because of the rapid increases in the price of other fuels. In addition, there is evidence that the Amarillo and Pueblo rates, when negotiated, were depressed by competition from closer Colorado and New Mexico coal sources and that respondents are currently seeking to renegotiate these rates. These factors must be considered in weighing the value of protestant's comparisons.

We agree with protestant that respondents' rate comparisons, with one exception, do not provide a valid basis for comparison with the rates proposed in this proceeding. The two rates on coal shipments from Gallup, N. Mex., to Joseph City, Ariz., involve a distance of only 117 miles as opposed to the instant 1,607-mile movement. The

[22]The rate on unit-train coal traffic from Cordero, Wyo., to Elmendorf, Texas was prescribed by the Commission in *San Antonio, supra,* so that movement of coal could commence to meet the shipper's needs. We expressly stated that as actual experience was gained, the rate would be subject to modification upon petition of either party. By order of the Commission, served October 27, 1977, that proceeding has now been reopened. In light of the uncertainty at this time as to the reasonableness of the rate previously prescribed, we believe it would be inappropriate to use it as a basis of comparison here.

[23]Protestant contends on rebuttal that the effective date of these comparative rates are all very recent, post dating the energy crisis. However, the current rates have increased under escalation formulae since the original base rates went into effect. Respondents contend that the base rates were negotiated under completely different competitive circumstances than exist today. Therefore, these rates, even at current levels, are not a valid basis for comparison, particularly in view of respondents' continuing attempt to renegotiate them at higher levels.

rates from Gallup, N. Mex., to Trona, Ariz., and from Converse, Colo., to Gary, Ind., move annual volumes of only 375,000 and 600,000 tons respectively, as opposed to the movement of 5,200,000 tons per year involved in this case. The disparities in terms of distance and annual tonnage between those rates and the proposed rates are so great as to render them of little probative value as bases for comparison.

The currently effective rate on unit-train coal movements from Belle Ayr, Wyo., to Amsterdam, Mo.[24] is, however, sufficiently comparable to merit consideration. Although distance and annual volume are considerably less than the HL&P movement, the mileage and 1,600,000 ton minimum are high enough to make the traffic very attractive to the carrier. It is otherwise comparable in terms of origin point, car ownership, minimum tons per unit-train, distance of movement, and loading and unloading time. The current rate of $8.53 per net ton yields approximately 9.8 mills per net ton-mile—approximately 0.1 mill higher than would the proposed rate of $15.60. However, the proposed rate of $16.54 would yield approximately 10.3 mills per ton-mile—($0.013) which is considerably higher in light of the larger volume and longer haul involved in the HL&P traffic.

We are mindful that rates are unlawful only if they exceed the zone of reasonableness. The existence of many rates within the zone can support no inference as to what the maximum reasonable rate should be. Moreover, any reliance on rate comparisons must be measured against the statutory policy evinced by the 4R Act. It is clear that Congress intended that the railroads be given increased ratemaking flexibility, even where they possess market dominance, so long as their rates are not unreasonably high or otherwise unlawful. We believe respondents' Amsterdam rate is the most comparable since its recent (October 13, 1977) effective date most closely reflects the current value of coal and its transportation. Protestant's comparisons, though established under different market conditions, point to the existence of a broad zone of reasonableness. Given the clear statutory intent, it would be inappropriate to force respondents toward the lower end of that zone, as protestant would have us do. We conclude that the Amsterdam rate, although not conclusive in and of itself, is one indicium that the $15.60 (although not the $16.54 rate) is within the zone of reasonableness.

[24]In Suspension Case No. 66841, the Commission's Suspension and Fourth Section Board voted not to suspend this rate. That decision was affirmed by division 2 on June 30, 1977. The current rate of $8.53 per net ton became effective October 13, 1977.

As noted, evidence presented by the parties on the relationship between the cost of service and the proposed rates has proved the most controversial issue on this record. In our restatement of costs in appendix B, we have rejected the inclusion of equity capital costs in our computation of variable costs. Respondents' use of an 11-percent (after tax) rate of return on the original cost basis does not technically reflect variable costs. In recent years, we have recognized net investment (original costs less depreciation) to determine the cost base. In ***Rules To Govern Assembling & Presenting Cost Evidence***, 337 I.C.C. 298, 393 (1970), we held, after repeatedly emphasizing that costing is not to be confused with ratemaking, that the actual interest rate the railroads are paying on their existing debt is the proper factor to be applied to debt plus equity capital to determine variable costs. Accordingly, our restatement of the estimated cost reflects an allowance for cost of capital on the net investment basis utilizing the various embedded debt rates submitted by protestant. Our restatement of the locomotive diesel unit and caboose capital costs reflects our use of a 7.85 percent return based on the average interest for equipment trust certificates. However, consistent with the underlying methodology in the ***San Antonio*** case, ***supra***, we have accepted respondents' inclusion of incremental costs of fixed plant investment for 1976 and 1977.[25]

Our restatement yields a variable cost figure of $9.59 per net ton and a fully allocated cost figure of $12.86 per net ton, using the ratio or dollar method. The $15.60 rate is thus 163 percent of variable costs and 121 percent of fully allocated costs, while the $16.54 rate is 172 percent of variable costs and 129 percent of fully allocated costs.

In rejecting respondents' use of an 11-percent rate of return in their costing methodology, we do not suggest that the current cost of equity capital should not be considered in the determination of the reasonableness of the proposed rate. As we noted in ***Rules to Govern Cost Evidence, supra***, at page 393:

> Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or new risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to

[25] There is no question that the tremendous volume of coal involved here will require substantial upgrading of fixed plant investment to handle the traffic safely and efficiently. Respondents' allocation of the portion of this incremental investment attributable to HL&P is based on projected annual tonnage moving over respondents' lines and does not appear unreasonable.

> be given here to costs. ***This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking—it should if transportation is to remain under private ownership and control ******.
>
> However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees *** as to why equity capital invested in carrier facilities should be treated in the same manner as similar debt capital. Such equity capital is then entitled to receive imputed interest, similar to that charged for borrowed money.

As the italicized language indicates, this narrow construction may be appropriate for cost-finding purposes, but does not preclude other ratemaking considerations in appropriate cases. We are convinced that the consideration of rail need to attract equity investment is appropriate in a capital incentive rate proceeding.

Section 205 of the 4R Act had a dual effect: it made sections 15a(2) and (3) of the act inapplicable to railroads as of February 5, 1976, and it set forth a new rule of ratemaking to be applied to the railroads in section 15a(4). That section provides:

> With respect to common carriers by railroad, the Commission shall, ***within 24 months after the date of enactment***, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support present capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels ***.

As the italicized language indicates, we have until February 5, 1978, to adopt standards and procedures to assist the railroads to attain adequate revenue levels. We are presently considering a wide variety of issues relating to this problem in a rulemaking proceeding, Ex Parte No. 338, ***Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels***. It would be inappropriate in the context of this proceeding to prescribe standards for future application which might prejudge the issues in that proceeding. This is particularly true in light of proposals in Ex Parte No. 338 that overall revenue need should not be considered in individual cases

such as this but rather in independent proceedings. However, although the statute does not technically require application of adequate revenue considerations prior to February 5, 1978, the intent of Congress is clear and we should affirmatively assist that policy to the extent possible pending the outcome of Ex Parte No. 338.[26] This policy is particularly strong in a capital incentive rate proceeding. Congress clearly intended to encourage large-scale rail investment in an effort to improve physical facilities, operations, and structure and infuse badly needed equity capital into the railroad industry.

Since we must determine a revenue need factor in the absence of the Ex Parte No. 338 standards or a record sufficient to suggest a more precise methodology, we are forced to use proxy tests as indicia of revenue need. One measure of comparision[27] would be use of respondents' suggested 11 percent cost of capital in our restated computation of costs to permit recovery of fully allocated costs plus return on investment on both variable and fixed portions of road property and equipment. A rate set at this level would be no higher than $16.07 per net ton.[28] Another possible comparison would be to take our restated fully allocated cost measure of $12.86 and add a weighted before-tax rate of return factor to it. For illustrative purposes we have used respondents' 11-percent after-tax figure which converts to a before-tax rate of 19.31 percent for the BN and 19.56 percent for Santa Fe (or a weighted 19.36 percent based on relative mileage of each in this movement). Application of this admittedly imprecise approach results in a figure of $15.35 per net ton.

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[26] Unlike the situation in Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 715 (1977), where the record was developed sufficiently to permit the adoption of an interim approach with respect to car-hire, the treatment of cost of capital in rate cases must await outcome of Ex Parte No. 338. Protestant has submitted computation of alleged levels of rate of return which the proposed rates would yield, using the so-called Discounted Cash Flow method. Respondents have moved to strike this portion of protestant's reply statement, but we decline to do so since it was submitted in reply to respondents' assertions concerning the rate of return of the proposed rates. However, the method used by protestant is unusable because it does not sufficiently explain the various factors used. In addition, it appears to assume without reason that the involved incremental capital costs are the full extent of fixed costs attributable to this movement, and the approach appears inconsistent with the procedures and rate data reporting requirements set forth in Ex Parte No. 290, *Procedures Governing Rail General Rate Increase Proc.*, 351 I.C.C. 544 at 589-90, 619-21, as well as any other reliable methodology for calculating a weighted-average cost of capital or rate of return.

[27] These proxy measures would, if anything, contain overstatements. Their imprecision mitigates against their use as an absolute measure. Accordingly, they are used here for illustrative purposes only.

[28] This is based on a recomputed variable "cost" level of 11.98 per net ton.

Taking all of these factors into consideration, we do not believe the proposed $16.54 rate to be just and reasonable. None of respondents' rate comparisons justify a rate at this level. Our restatement of costs (see appendix B) shows that this rate would equal 172 percent of variable costs and 129 percent of fully allocated costs. The record substantiates protestant's objection that the proposal of the $16.54 rate is a mere tactic to obtain protestant's agreement to an escalation clause at a lower rate. Moreover, we agree with protestant that the difference between the two rates is not justified as respondents claim, by delays and risks involved in seeking general rate increases. The difference between the two rates would amount to $11,800,000 per year on an annual volume of 5 million tons—a disparity which indicates that the alternative rate is designed to coerce HL&P into agreeing to respondents' escalation formula. In this regard, we note that a long period of unsuccessful negotiations preceeded the filing of the notice of intent, and resulted in the filing of a complaint by HL&P on May 6, 1977, in docket No. 36579. That complaint is presently pending.

Accordingly, when the relationship of the proposed $15.60 rate to variable cost is considered, together with evidence of other comparable rates and indicia of rail revenue need, and when the high value of transportation service of coal is taken into account, this rate does not appear to exceed a maximum reasonable level, although it is in the higher part of the zone of reasonableness. However, under any approach, the $16.54 rate is clearly unreasonably high, under the transportation circumstances here involved.

Since we have found that the $15.60 rate level would not be unreasonably high, we must consider whether the escalation clause or any other part of the proposal is unlawful. If any part of a proposal made under section 15(19) is held unlawful, those parts which are held lawful may nevertheless be published so long as they comply with section 6 of the act and our tariff publishing regulations.

With respect to the dual rate structure contained in respondents' proposed schedule, it must be noted initially that they have filed only a notice of intent to publish rate schedules under section 15(19); they have not yet filed a rate schedule under section 6 of the act. Clearly, if respondents choose to file a schedule in accordance with this decision, rule 4(i)(1) of Tariff Circular No. 20 (49 CFR 1304 (i)(1)) requires that the tariff clearly state the applicable rate. Under existing circumstances, we cannot sanction the publication of

a rate subject to an escalation formula. The fact that many shippers, including many utilities, have agreed to such formulae in lieu of general rate increases does not make such a practice mandatory.[29] While the Commission has found that unit-train coal rates subject to private *agreement* based on escalation formulae were not violative of the act,[30] no justification appears in this instance for imposing such a formula upon this shipper. Our comments in Ex Parte No. 327, *supra,* that parties may prefer to predetermine a formula for rate adjustment as an alternative to ex parte general increases does not support mandatory imposition of such a formula in a capital incentive rate case. Nor is the fact that HL&P passes costs on directly to its own customers in the form of "fuel adjustment" and "cost-of-services" clauses relevant to the issue here. We, therefore, find that imposition of the escalation formula proposed by respondents would constitute an unlawful and unreasonable practice under these circumstances.[31].

We find no merit in protestant's contention that respondents' failure to propose rates applicable to carrier-supplied cars violates sections 1(11) and 3(1) of the act. The cost of cars has not been considered in respondents' presentation of cost evidence. As we noted in *San Antonio, supra,* with regard to unit-train rates the shipper usually furnishes cars which are generally of a larger (100 tons) capacity than standard coal cars, in order to foster more efficient and economical operations. Here, protestant has already contracted to purchase specialized equipment, and there is no evidence it was coerced into this action.

Finally, protestant's allegations that the proposed rates constitute an unreasonable prejudice, disadvantage and discrimination in violation of section 3(1) of the act are without merit. Protestant's only evidence on the issue consists of the rates which it has offered on the issue of comparability—rates which, in mills per ton mile, are lower than the rates proposed here. In *San Antonio, supra,* at 417, we stated:

> A mere difference in rates, standing alone, does not demonstrate unlawfulness under section 3 of the act. *** general declarations as to competition or injury unsupported by evidentiary facts *** will not support a finding of undue preference and prejudice, see *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.,* 303 I.C.C. 383, 391.

[29] See *San Antonio, supra,* at 417.

[30] Ex Parte No. 318, *Increased Freight Rates and Charges—1976,* order served March 2, 1977.

[31] As we noted in Ex Parte No. 327, *supra,* at page 775, where the parties have not agreed to an escalation formula the railroad may publish increases of the capital incentive rate within the 5-year period (or thereafter) subject to normal suspension and investigation procedures under section 15(8) of the act.

While the record indicates that respondents likely will make capital investments of at least $1 million, respondents' failure to adequately document the present use of their existing pool of locomotives leads to uncertainty as to the precise size of the required investment. We, therefore, believe that status reports which set out in detail the actual investments made would be appropriate here. Accordingly, this proceeding shall remain open for the limited purpose of receiving these reports, commencing 1 year from the effective date of any schedule found lawful herein. The reports should detail the specific investment(s) actually made, with identifying details of each, the dollar amount actually spent on each such investment, and the extent to which investments set forth by respondents herein were not actually made and the reasons therefor, together with any additional information respondents deem relevant.

The carriers should in such status reports allocate the amounts of each expenditure attributable to the issue traffic. The parties should be aware of the Commission's responsibility to insure that the requirements of the 4R Act triggering the protections of section 15(9) have been met. If it appears that the minimum expenditures have not been made, or that the expenditures made are not attributable to the issue traffic, then the Commission will be required to take appropriate action. Options available in that event would, of course, include a finding that the incentive rate protections do not apply.

We find:

(1) Respondents have shown that they must make capital investments far exceeding $1 million because of the unit-train movements of coal from Cordero to Smithers Lake;

(2) Respondents have market dominance over the issue movements;

(3) The proposed rate of $16.54 per net ton exceeds a maximum reasonable level;

(4) The proposed rate of $15.60 per net ton is just and reasonable and not otherwise unlawful, but the proposed escalation clause on this rate is unlawful in the absence of bona fide agreement by the parties;

(5) This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER GRESHAM, concurring in the result.

COMMISSIONER CHRISTIAN, concurring in part:

I am in general agreement with the decision of the majority. However, I do not agree with the majority's conclusion that the proposed escalation clause is unlawful simply because there has been no bona fide agreement between HL&P and the railroads to its inclusion in this tariff proposal. I believe that a properly drawn escalation clause may be just and reasonable irrespective of whether a shipper agrees to its terms. However, in my opinion this particular escalation clause should be found unlawful because the new governmental regulation cost formula is ambiguous and unquantified. If this defect were cured, I would be prepared to find the escalation clause just and reasonable.

I also do not agree that our analysis of the tariff proposal under section 15(19) requires an allocation between existing and new equipment and a showing that the additional equipment is needed for the new service rather than for the carrier to fulfill its statutory obligation. In my opinion, the threshold requirement of section 15(19) is met when the carrier's expenditure to perform a new service meets the $1 million figure.

It is ordered, That respondents may file a rate on the subject traffic and movements, not to exceed a level of $15.60 per net ton,[32] subject to the findings and conclusions in this report and order, at any time within 180 days after the date of service of this report and order, to become effective on 30 days' notice. A schedule filed in compliance with this order may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under sections 1, 2, 3, or 4 of the act, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carriers.

It is further ordered, That should respondents file a schedule based on provisions found lawfal herein, they shall submit a detailed status report to the Commission 1 year from the effective date of any such schedule. This report shall state the specific qualifying

[32] Subject, as previously discussed, to imposition of general increases. See Ex Parte No. 327, *supra.*

investments actually made as of the date the report is filed, together with the amount actually spent on each investment, and shall also state the extent to which investments set forth by respondents herein were not actually made and the reasons therefor. The original and five copies of this report shall be served on the Commission and a copy shall be served on all parties to this proceeding. The first page of the report shall specifically refer to the title and docket number of this proceeding. The Commission reserves the right to order such additional reports as may become necessary during the effectiveness of any such schedule.

This proceeding shall remain open for the limited purpose of receiving such reports.

By the Commission.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

REDUCTION

ICC 485

BURLINGTON NORTHERN INC.

In Connection With

THE COLORADO AND SOUTHERN RAILWAY COMPANY
FORT WORTH AND DENVER RAILWAY COMPANY
THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY

FREIGHT TARIFF 278

JOINT FREIGHT TARIFF

PROVIDING

UNIT TRAIN ALL-RAIL

RATES

ON

COAL, CARLOADS

FROM		TO	
CORDERO	WYOMING	SMITHERS LAKE	TEXAS
JACOBS JCT	WYOMING		

This tariff does not apply on Intrastate traffic.

COAL TARIFF

NOTICE

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED NOVEMBER 30, 1977 EFFECTIVE DECEMBER 30, 1977

Provisions named herein authorized by Commission order served November 30, 1977, Docket No. 36608 in conformity with 49-CFR 1109.20.

Issued by
H. H. KIRCHOFF,
Manager, Rate Publications
176 East Fifth Street
ST. PAUL, MN 55101

BN Tariff 278

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
10	Station Lists and Conditions	This tariff is governed by the Official List of Open and Prepay Stations 92, (Station List Publishing Company, Agent), I.C.C. A-57, to extent shown below: PREPAY REQUIREMENTS AND STATION CONDITIONS For additions and abandonments of stations, and except as otherwise shown herein for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight, and changes in station facilities. When a station is abandoned as of a date specified in the above named tariff, the rates from and to such station as published in this tariff are inapplicable on and after that date.
20	Reference to Tariffs, Items, Notes, Rules, Etc.	Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.
35	Transfer Between Connecting Carriers	The joint rates published in this tariff include all charges for switching, drayage, or other transfer services at intermediate interchange points on shipments handled through and not stopped for special services at such interchange points.
40	Consecutive Numbers	Where consecutive numbers are represented in this tariff by the first and last number connected by the word "to" or a hyphen, they will be understood to include both of the numbers shown. If the first number only bears a reference mark, such reference mark also applies to the last number shown and to all numbers between the first and last numbers.
45	Capacities and Dimensions of Cars	For marked capacities, lengths, dimensions and cubical capacities of cars, see Official Railway Equipment Register (National Railway Publication Company, Agent), ICC-RER 405.
60	National Service Order Tariff	This tariff is subject to provisions of various Interstate Commerce Commission Service Orders and General Permits shown in National Service Order Tariff 1-F, WTL ICC A-4954.
75	Method of Cancelling Items	As this tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. EXAMPLE: Item 100-A cancels Item 100, and Item 200-B cancels Item 200-A in a prior supplement, which, in turn, cancelled 200.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
80	Intermediate Application-Origin	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3 and 4 below, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this tariff, which point is intermediate to a point from which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies to the same destination, apply from such intermediate point to such destination and via such route the commodity rate in this tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route. NOTE 1.—The rate from the intermediate point authorized by this rule is subject to the same conditions to which the rate from the next point beyond is subject. NOTE 2.—When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate from the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points from which commodity rates on the same article via the same route are published in this tariff, apply via that route from the intermediate point the rate from the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point from which the lowest charge is applicable. NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume in unit train during a specified period of time, from the intermediate origin point applicable over the same route to the same destination, the provisions of this rule are not applicable from such intermediate origin point.
85	Intermediate Application-Destination	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3 and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is not named in this tariff, which point is intermediate to a point to which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate in this tariff on said article to the next point beyond to which a commodity rate is published herein on that article to the same destination via the same route.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
85	Intermediate Application-Destination—Continued	NOTE 1.—The rate to the intermediate point authorized by this rule is subject to the same conditions to which the rate to the next point beyond is subject. NOTE 2.—When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate to the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points to which commodity rates on the same article via the same route are published in this tariff, apply via that route to the intermediate point the rate to the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point to which the lowest charge is applicable. NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume during a specified period of time, to the intermediate destination applicable over the same route from the same origin, the provisions of this rule are not applicable to such intermediate destination point.
100	Method of Denoting Reissued Matter in Supplements	Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number, the number being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.
105	Definition of Ton	Where the term ton is used in this tariff it means ton of 2,000 pounds.

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
110	Industries from Which Rates Named in Item 200 Apply	Provisions published herein apply from the Kerr-McGee Mine at Jacobs Jct., Wyoming and/or from the Sunoco Energy Development Co. mine at Cordero, Wyoming to the Houston Lighting and Power Co. at Smithers Lake, Texas.
120	Demurrage	This tariff is not subject to provisions of Agent D. M. Rogers' Tariff 4-K, ICC H-74, nor Agent D. M. Rogers' Tariff 8-O, ICC H-30.
125	Weighing	Rates in this tariff do not include weighing of loaded cars by carriers. Weights to be used for assessment of freight charges shall be those ascertained at origin by consignor, subject to supervision and verification by the Western Weighing and Inspection Bureau, and furnished by consignor to the railroads for this purpose.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
130	Furnishing Cars and Minimum Tenders	Except as otherwise provided in Item 133, rates in this tariff apply only on shipments tendered to BN in open top cars with rotary couplers having marked capacity of not less than 200,000 pounds, furnished by consignee at no expense to the railroads parties to this tariff, loaded to full visible capacity, subject to per shipment tenders of not less than 105 cars (See Exception and Note), on one bill of lading at one time from one consignor at one location at one origin, to one consignee for one delivery at one time at one location at one destination. No allowance will be paid by the carriers to the consignor, consignee or owner on such cars. Car maintenance will be borne by consignor, consignee, owner or lessee of such equipment. This tariff is not subject to the provisions of Agent D. M. Rogers' Tariff 7-F, ICC H-68. EXCEPTION.—In the event consignee is unable to furnish for loading at least 105 cars (See Note) because cars have been damaged, destroyed or derailed by carrier requiring removal from service, and the carrier is unable to substitute carrier equipment under provisions of Item 133, the per shipment minimum tender of 105 cars shall be reduced by the number of cars carrier is unable to substitute under provisions of Item 133, but the minimum per shipment tender shall in no case be less than 90 cars. NOTE.—If sufficient empty cars are not available for loading to meet the minimum tender requirements of this item, carrier will accept loaded cars tendered with charges to be assessed based on actual tons loaded as determined under provisions of Item 125 plus 98 tons per car for each car short of the minimum tender requirements. Such deficit weight will be considered as tons received in meeting the minimum annual volume requirements named in this tariff.
132	Empty Movement	Rates herein include return movement of the train of empty cars from a destination in this tariff to the same mine at an origin in this tariff.
133	Carrier Equipment	When cars furnished by consignee under Item 130 are damaged, destroyed (See Note 2) or derailed by a carrier participating in this movement, requiring removal from service, that carrier will furnish, if available, open top cars of not less than 200,000 pounds nominal marked capacity for each such car damaged, destroyed (See Note 2) or derailed pending repair and replacement in service, each substituted carrier owned car to be loaded to full visible capacity. Rates in Item 200 will apply on tonnage loaded in such cars furnished by the carrier (See Notes 1 and 3). Tonnage moving under the provisions of this item will be used to make up the annual volume tonnage requirements of this tariff.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
133	Carrier Equipment—Continued	NOTE 1.—Carrier must furnish written notification to consignee that its cars (designating them by car initial and number) were damaged, destroyed (See Note 2) or derailed on (month-day-year) and will upon written request (See Note 3) by the consignee furnish railroad owned cars of like capacity, if available, until such time as the damaged, destroyed (See Note 2) or derailed car or cars are repaired and/or replaced in service. NOTE 2.—If cars are destroyed, carrier will substitute railroad car, if available, for a period of not to exceed 300 days following settlement of claim for such cars, but in no case is period to exceed 365 days following date of actual destruction. Consignee must present evidence to carrier within 60 days following settlement of claim that cars have been purchased or leased to replace those destroyed. NOTE 3.—The consignee shall confirm request for the substitution of railroad owned cars within 30 days of the date damage or destruction occurred to consignee furnished cars and shall furnish a certificate stating: "This is to certify that on (month-day-year) the following cars furnished by consignee (list car numbers) were damaged or destroyed and are being taken out of service to be either repaired or replaced, and confirms our request that carrier cars, if available, be furnished under the provisions of Item 133, BN Tariff 278, ICC 485."
135	Loading and Unloading	Consignor will at its expense perform the loading of the cars at loading point. The origin carrier will move empty cars under the loading spouts at consignor's loading facilities at a controlled speed during the process of loading the cars. Consignee will at its expense perform the unloading of cars at consignee's unloading facilities at destination.
137	Facilities	Consignors and consignees will provide facilities at origin and destination to permit receipt by BN and delivery by ATSF of trainload shipments contemplated herein.
138	Advance Notice of Arrival of Cars at Loading Point	The ordering of cars in the case of a shipment under this tariff will not be required. Cars will be made available for loading immediately upon arrival at origin point. The agent of the origin carrier will furnish the consignor not less than four (4) hours advance notice by telephone of the arrival of said cars at origin loading point. Agent of the origin carrier will keep a running record of the hour and minute that advance notice was furnished.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
140	Loading Time and Origin Detention	1.—All loaded cars in each shipment shall be tendered to the BN for movement to destination within four (4) hours after actual placement by the BN of first empty car at consignor's loading facility to load by consignor or within four (4) hours after notice of constructive placement (see Paragraph 2). 2.—When actual placement of all empty cars for loading cannot be made on account of the inability of the consignor to receive them, or because of any other condition attributable to the consignor, such cars will be held at origin, or, if they cannot be accommodated at origin, at an available hold point short of origin and notice shall be sent or given to the consignor that the BN is unable to place all the empty cars for loading. This will be considered constructive placement. (See Note) 3.—After the expiration of the free time in Paragraph 1 above, the consignor will be assessed a charge of $150 per hour for each hour or fraction thereof for all cars in the shipment for delay of shipment in excess of the free time limit. In the event any of the disabilities referred to in Paragraph (h) of Item 150 including carrier's mechanical failure or other train delay directly attributable to carriers prevents consignor from loading shipment, the free time will be extended for an additional period equivalent to the time such disability prevents such consignor from loading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevented such loading including the time and date such disability originated and terminated. NOTE.—If, at carrier's option, empty cars are held short of origin, time required for movement of said cars from hold point to origin to consignor's loading facility will not be included in the computation of free time.
145	Unloading Time and Destination Detention	Four (4) hours free time will be allowed for unloading all cars included in a unit train shipment, the free time to be computed from the time of actual or constructive placement of all cars in such consignment. Actual placement is made when all cars of the unit train consignment have been placed in position on consignee's receiving track facility. If such actual placement is prevented due to any cause attributable to the consignee, the cars shall be considered constructively placed (See Note 1). After the expiration of the free time allowed in the preceding paragraph, the consignee will be assessed a charge of $250 per hour for each hour or fraction thereof for unit train delay in excess of the free time limit. In the event any of the disabilities referred to in Paragraph (f) of Item 150, including the use of carrier furnished substituted cars (see Item 133) prevent consignee from unloading shipments, the free time will be

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
145	Unloading Time and Destination Detention—Continued	extended for an additional period equivalent to the time such disability prevents consignee from unloading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevent such unloading including the time and date such disability originated and terminated. NOTE 1.—When actual placement of all loaded cars in a consignment cannot be made because of any condition attributable to the consignee, such cars will be held at an available hold point and constructive placement notice shall be sent or given to the consignee within 24 hours after arrival of cars at hold point. This will be considered constructive placement.
150	Application of Rates	(Applicable only where specific reference is made to this item) (a) Except as otherwise provided in Paragraph (f) and subject to the provisions of this item, rates in item making reference to this item are applicable only on shipments from consignors at one or more origins in such item, to a consignee who receives at one destination in such item not less than the volume requirement specified in Paragraph (b) below of one or more of the commodities named in items referring to this item. VOLUME REQUIREMENT (b) 4,000,000 tons received during the 12-month period commencing with the date of written notification to the BN and ATSF and thereafter during 12-month periods commencing with the anniversary day of the first 12-month period. (c) Initially, the rate in items making reference to this item shall be charged. (d) If during any 12-month period described in Paragraph (b), the tonnage required of a consignee is not met, rate in items making reference to this item shall not be applicable on shipments that have been moved during the 12-month period unless the charges resulting from application of the rates in Item 291, BN Tariff 219-B, ICC 437, exceed the lowest charges that would have been collected if the tonnage requirements had been met. In this event the deficit in tonnage shall be billed at the annual volume rate and be collected by ATSF. (e) Certification of shipments moving at such rates shall be made by ATSF. DISABILITY RULE (f) If during any calendar day or days (See Notes 2 and 3) in any 12-month period stated in Paragraph (b) of this item shipments cannot be made under rate referring hereto by a consignor to a consignee due to an act of God, strikes or lockouts in the railroad

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
150	Application of Rates—Continued	industry or strikes or lockouts or mechanical breakdown or fire in the consignor's or consignee's plant or facilities (See Note 1), the calendar day or days during that 12-month period in which shipments due to such occurrences cannot be made shall be considered as a disability day or days and the minimum aggregate tonnage required of that consignee during that 12-month period shall be reduced by 1/365 for each such disability day. Any day in which two or more of such events occur shall be considered as one disability day. NOTE 1.—The consignor, consignee or participating carrier encountering disability days shall within 30 days of the date the disability occurred notify the carrier or inspection bureau, as the case may be, having jurisdiction over the volume movement of such disability and shall furnish a certificate stating: "This is to certify that on (month-day-year) the following disabilities occurred (here show type of disability as provided in Paragraph (f)) thereby resulting in authorized reduction in volume tonnage as specified in (here show specific paragraph, item number and ICC number of tariff)." NOTE 2.—If shipments are made by a consignor to a consignee under this item during any calendar day in which one or more of the events specified in this paragraph occur, that day with respect to shipments from the consignor to the consignee shall not be considered as a disability day. NOTE 3.—Saturdays, Sundays and legal holidays shall not be counted unless consignor's loading facilities or consignee's unloading facilities normally operate on those days. The term legal holidays embraces only the following: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. In the event one of the above holidays occurs on a Sunday, the following Monday will be considered as a holiday. Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in different states as "Memorial Day", "Decoration Day" or otherwise, and generally observed in lieu of May 30 will for the purpose of this item be treated as Memorial Day.

Rules 4(i) and 7 of Tariff Circular waived; ICC Permission No.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS LIMITED

Item	Subject	Application
155	Escalation of Rates	(Applicable only when specific reference is made hereto) Tariffs referring hereto are not subject to Ex Parte Increases but are subject to annual escalation determined by use of the following formula: **ESCALATION FORMULA** Effective July 1 rates are subject to escalation by an amount based 80 percent of the present rate multiplied by the change in the index for the two (2) preceding years. Thus the following formula will determine the amount of escalation to be applied for the annual period July 1, 1977 through June 30, 1978 (See Notes 1 and 2). YEAR — INDEX 1975 — 215.0 1976 — 236.7 (.8) x Present Rate (236.7 - 215.0) (.8) x Present Rate (-----------------) (215.0) **EXAMPLE** (236.7 - 215.0) (.8) x 1 1000¢ (-----------------) (215.0) 800¢ x .10093 = 80.74 = 81 ¢ Amount of escalation: 81¢ Rate effective July 1, 1977: 1081¢ 1 Rate in cents per net ton of 2,000 pounds NOTE 1.—When shipments first commence, 100 percent of the rate will be escalated from the previous July 1 until month in which shipments commence, then 80 percent will be applied for remainder of the 12-month period until July 1 of the succeeding year.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS LIMITED

Item	Subject	Application
155	Escalation of Rates—Continued	EXAMPLE Present Rate: 1000 ¢ per net ton of 2,000 pounds Date of first movement: March 1, 1977 1000¢ x .10093 x .667 = 67.32 800¢ x .10093 x .333 = 26.89 94.21 = 94¢ Amount of escalation: 94¢ Rate effective July 1, 1977: 1094¢

NOTE 2.—Fractions resulting from the application of the formula will be dropped if less than a half-cent and converted to the next higher whole cent if one-half cent or more.

Any cost increases caused by new governmental regulations (except federal income taxes) will be added directly to the rates. BN will have the obligation of demonstrating to the shipper the effect of such cost increases.

RATES IN CENTS PER 2,000 POUNDS

Item	Commodity	From	To	Rate
200	COAL. Subject to Item 150. Route via BN-Denver, CO-CS-Sixela, NM-FWD-Ft. Worth, TX-ATSF.	Cordero.......... WY Jacobs Jct...... WY	Smithers Lake ... TX	1560

EXPLANATION OF ABBREVIATIONS

ATSF......Atchison Topeka and Santa Fe Company, The.
BN......Burlington Northern Inc.
CS......Colorado and Southern Railway Company, The.
FWD......Fort Worth and Denver Railway Company.
ICC......Interstate Commerce Commission.
No......Number.
RER......Railway Equipment Register.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
110	Industries From Which Rates Named in Item 301 Apply.	Kerr-McGee Corporation, Jacobs Ranch Mine located in Campbell County, Wyoming.

RATES

Item	Commodity, carloads	Application	Rates in class per 2,000 pounds
301	COAL, BITUMINOUS. (See Notes 1 to 6).	FROM (1) Cordero.... WY TO Smithers Lake ... TX	2488

NOTE 1.—Applicable only in open top cars having marked capacity of 196,000 pounds loaded to full visible capacity, subject to aggregate minimum of 105 cars per shipment tendered on one bill of lading, on one day, at one time, from one consignor at one location at one origin, to one consignee, at one location, at one destination.

NOTE 2.—Cars used for the transportation of coal hereunder must be furnished by consignor or consignee at no expense to the railroads parties to this tariff and no allowances, mileage payments or per diem will be paid on these cars to the consignor, consignee or owner thereof.

NOTE 3.—Rate includes the return movement of empty cars for movement from Smithers Lake, Texas to Cordero, Wyoming.

NOTE 4.—The carriers will not weigh shipments to obtain weights for assessment of freight changes. Weight ascertained at origin by consignor or at destination by consignee, subject to supervision and verification by the Western Weighing & Inspection Bureau shall be furnished by such parties to the SP for this purpose.

NOTE 5.—Consignor will at its expense perform the loading of the cars at loading point. The BN will move empty cars under the loading spouts at consignor's loading facilities at a controlled speed for fully and uniformly loading the cars. Consignee will at its expense perform the unloading of cars at consignee's unloading facilities at destination. The destination carrier will move loaded cars into consignee's unloading facilities at a controlled speed consistent with consignee's requirements.

NOTE 6.—Four hours free time will be allowed for loading of cars. Four hours free time will be allowed for unloading of cars. After the expiration of free time, the consignor at origin or consignee at destination, as the case may be, will be assessed a change of $250 per hour for each hour or fraction thereof for all cars in the shipment for delay of shipment in excess of the free time limit.

(1) Includes industries taking same rates as shown in Item 110.

Route via BN-Wendover, WY or Denver, CO-CS-Sixela, NM-FWD-Ft Worth-ATSF.

APPENDIX B

Analyses of cost evidence

I. PROTESTANT'S OPENING STATEMENT

Protestant has introduced a variable cost per ton of $8.61 and a cost per carload of $904.41 based on a lading weight of 210,000 pounds per car.

Basic Rail Form A[1] unit costs were developed for the calendar year 1976 and indexed[2] to reflect wages and price levels as of July 1, 1977, through use of AAR indices for fuel, material and supplies, and labor. These unit costs were developed separately for each carrier involved in the movement, i.e., Burlington Northern (BN), The Colorado & Southern Railway Company (C&S), Fort Worth and Denver Railway Company (FW&D), and Atchison, Topeka and Santa Fe (AT&SF). (It should be noted that both the C&S and FW&D are subsidiaries of the BN system.) Some basic Rail Form A system average unit costs have been replaced by actual costs where possible, and others have been adjusted to reflect the traffic and operating characteristics peculiar to the coal traffic at issue. Table 1 is a summary of traffic and operating characteristics used in developing cost for the proposed movement.

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[1]Rail Form A (ICC Statement No. 1F1-73, *Formula for Use in Determining Rail Freight Service Costs*.

[2]Ratio of 1.091.

TABLE 1

Summary of traffic and operating facts used in developing variable costs

Item	BN	C&S	FW&D	AT&SF	Total
1. Annual volume-tons	xxx	xxx	xxx	xxx	5,000,000
2. One-way mileage	506	349	453	299	1,607
Car characteristics					
3. Average load per car-tons	105	105	105	105	105
4. Tare weight per car-tons	26	26	26	26	26
Train characteristics					
5. Cars per train	110	110	110	110	110
6. Train sets	10	10	10	10	10
7. Trips per year per train set	45	45	45	45	45
8. Average diesel units per carrier	5.09	6.49	6.13	5.0	5.67
9. Round trip gross ton-miles	79,442	54,793	71,121	46,943	252,299
10. Yard switching time-hours	1.4	.38	.28	1.2	9.2
11. Switching minutes per car	0.75	2.05	1.54	0.67	5.01
12. Crews (round trip)	8	6	8	5	27

Rather than use basic Rail Form A system average unit costs exclusively, protestant computed the actual cost for the following items. The first, crew wages reflects basic daily and mileage rates of pay as of July 1, 1977, actual crew districts and mileage, weight of the SD-40 diesel-electric locomotives units used, number of persons comprising the crew on each railroad involved in the movement, general overheads and transportation departmental overhead ratios, and a constructive allowance ratio developed from each railroad's wage statistics. (No detail was shown of the development of crew wages from the above factors.)

The diesel-electric locomotive unit capital costs (return and depreciation) per carload for BN and AT&SF were increased to reflect each railroad's proportionate share of the purchase of 60 locomotive units plus spare parts equivalent to five units. Based on 1976/77 equipment trust certificates, a return on investment of 7.85 percent was used for both railroads. Based on their annual reports to the Commission, an annual depreciation rate of 3.92 percent was used for the BN and 4.30 percent for the AT&SF. Also, each carrier's diesel-electric unit miles and gross ton-miles were increased to reflect the additional annual coal movement.

The station clerical cost per carload was based on $1.25 per carload for billing unit coal train service in shipper furnished cars. This annual allowance of $60,000 for the 450 waybills equals $133 per shipment on one waybill.

The helper service cost per carload on the BN at Belle Ayr, Wyoming and Crawford, Nebraska was divided between the diesel-electric unit mile portion and the crew cost portion. The locomotive unit-mile portion was included in the expense "locomotive unit-mile cost per carload excluding locomotive capital costs" (exhibit LEP-4, page 1, line 3 of protestant's opening statement). The crew wage portion of this cost was based on wage rates as of July 1, 1977, increased for the appropriate overheads and allowances.

The caboose capital costs per carload were increased to reflect the purchase of eight cabooses by the BN, and three by the AT&SF, plus spare parts equivalent to one caboose. Based on 1976/77 equipment trust certificates a return on investment of 7.85 percent was used for both railroads. Based on their annual reports to the Commission, an annual depreciation rate of 3.11 percent was used for the BN and 3.23 percent for the AT&SF.

Other unit costs used in development of the cost of moving the unit train followed Rail Form A procedures. Briefly, these are as follows:

The expense portion of gross ton-mile costs, excluding locomotive capital costs for each railroad, was applied to the round trip gross ton-miles over each carrier to reflect that cost on a per carload basis. Round trip gross ton miles reflect the gross tons of cars and contents in the loaded direction, gross tare tons of cars in the empty direction, total train miles, and number of cars in the train consist. The cost per locomotive unit-mile excluding locomotive capital costs was multiplied by the round trip diesel-electric unit miles and divided by the cars in the train consist to reflect that cost on a per carload basis. The other train-mile unit cost, excluding caboose capital portion, was multiplied by the round trip train miles and divided by the number of cars in the train. These other train miles expenses reflect such items as dispatching trains, signals and interlockers, crossing protection, et cetera. Train supplies and expenses running per car were divided by the number of cars to develop the train supplies and expenses running cost per carload for the distance traversed over each involved railroad.

The car inspection cost per car-mile was multiplied by the round trip train miles to reflect the cost on a carload basis. The cost per revenue switch engine minute was

multiplied by the switching minutes per carload to provide the cost per carload. The carload claims clerical cost per ton was multiplied by the average load per car to provide the cost on a per carload basis. Loss and damage cost per carload was based on evidence filed in docket No. 36180, *San Antonio, Tex. v. Burlington Northern, Inc., supra.*

The 13 cost elements were then totaled by railroad, and also in total, to yield the following cost per carload:

BN	$285.175
C&S	220.580
FW&D	235.310
AT&SF	163.345
Total	$904.41

Based on 105 tons per car, the cost is $8.61 per ton.

II. RESPONDENTS' REPLY STATEMENT

Respondent railroads have submitted a variable cost of $12.65 per ton. When compared with the $15.60 proposed rate per ton, the ratio of rate to cost is 123 percent. Also submitted are fully allocated costs of $19.83 based on the ton and ton-mile method and $16.96 based on the ratio (dollar) method.

Respondents state that the difference in their estimate of $12.65 and protestant's estimate of $8.61 lie in several areas, as follows:

(1) Differences with respect to traffic and operating characteristics;

(2) Differences with respect to capital cost, i.e., the proper rate of return to be used;

(3) Differences with respect to treatment of incremental investments required to handle this coal traffic—including locomotive and track structure; and

(4) Differences with respect to locomotive unit-mile expenses, train-mile, crew wages, and station clerical expenses.

More specifically, these major differences are as follows:

1. *Traffic and operating characteristics.*—The following table summarizes the differences between protestant's and respondents' viewpoints on traffic and operating characteristics.

TABLE 2

Differences in operating characteristics between protestant and respondents

Traffic	Protestant	Respondents
Annual volume—Tons	5,000,000	5,200,000
Round trip transit time—Hours	xxx	176
Motive power		
Locomotive consists:		
BN	5	5
C&S	7	7
FW&D		
Texaline to Amarillo	7	7
Amarillo to Ft. Worth	6	6
Santa Fe	5	6
Helper consist: Nebraska (26 miles)	3	3
Wyoming (20 miles)	1	1
Crew districts (loaded & empty)		
BN	8	8
C&S	6	6
FW&D	8	8
Santa Fe	6	8
Total	28	30
Yard engine switching		
BN—Hours	8.00	8.13
Santa Fe—do	1.20	1.78
Total—do	9.20	9.91
Road engine switching		
BN—Jacobs Ranch Mine, Wyo.—do	---	4.00
—On line—do	---	3.00
Santa Fe—Smithers Lake—do	---	3.25

Protestant used 65 locomotive units in developing costs based on an 8-percent spare margin. Respondents used 69 units based on a 15-percent spare margin. Respondents support their argument for a 15-percent spare margin by the division of active unit hours by the hours owned, as shown in exhibit JAD-1 of their reply statement.

Protestant asserted that only five locomotive units would be needed on the AT&SF. Exhibit JAD-2 to respondents' reply statement is a tonnage rating sheet for part of the AT&SF route. Respondents state that this sheet shows that 5.7 units will be required

for the unit coal trains. Also, acceleration is 23 percent greater with six units than with five, thereby reducing delays to other trains caused by the unit coal train.

2. *Differences with respect to the rate of return.*—Respondents used an after tax rate of 11 percent reflects the cost of equity as well as debt capital and takes account of the effect of income taxes. Protestant used embedded debt rates of approximately 5.5 percent for the BN and 6.1 percent for the AT&SF which completely ignores the higher cost of equity capital and the effect of income taxes on the return on equity capital. Respondents argue that no one today believes that the overall cost of capital (debt and equity) to the railroads after provisions for income taxes is in the range of 5.5-6.1 percent. Respondents further maintain that protestant's approach is contrary to the 4R Act.

Respondents contend that the return portion of the variable cost of the unit coal train movement is $4.05 compared with protestant's $0.87 per ton, a difference of $3.18. For the return in fully allocated costs computed by the ratio (or dollar) method, respondents' $5.65 per ton exceeds protestant's estimated return of $1.22 by a margin of $4.43 per ton.

3. *Differences with respect to treatment of incremental investment required to provide service.*—Respondents state that they must purchase 69 diesel-electric locomotive units to handle the HL&P unit coal trains. Protestant concedes that 65 units and spares are being purchased and should be considered in developing costs for the proposed movement. As far as the cost of new investment in the track structure is concerned, respondents state they they have allocated only part of these costs to the HL&P. Other coal shippers would also pay their share of the cost of these new capital investments.

Respondents contend that protestant did not allocate the cost of the locomotives or improvements to the track structure to HL&P. Instead, respondents argue, protestant adjusted system average costs and then recomputed the costs of the movement using these system average costs. The effect of this approach was to assign "only a very small fraction" of the capital costs to HL&P traffic. The remainder of the capital costs would, in effect, be shifted to shippers which would not benefit from the improvements. Respondents argue that they have used the costing method which attributes these additional costs to the shippers which would benefit from the improvement. Respondents state that their approach is supported by the Commission's decision in docket No. 36180, *San Antonio, Tex. v. Burlington Northern, Inc., supra.* In the *San Antonio* case, the Commission treated the railroad's investment in upgrading and improviing the line as an incremental cost to be borne by the shippers, and it approved the allocation of a fair portion of those incremental costs to the San Antonio unit coal train.

4. *Other cost items.*—Protestant used system average locomotive unit-mile expenses. Respondents insist that the six-axle heavy duty locomotives used in unit coal trains are 11 percent heavier than the average system locomotive. Therefore, they are more expensive to operate because of higher maintenance, fuel, and other expenses. Consequently, respondents adjusted the system average Rail Form A unit-mile expense by increasing it by 11 percent. AT&SF repair records (exhibit JAD-3) show that repair expenses for six-axle locomotive units are 15.662 percent greater than system averages, so respondents contend the 11 percent actually used was conservative.

The difference between protestant and respondents, with respect to train-mile crew wages is $11.93 per car. Respondents contend that protestant used the wrong wage

rate schedule. The wage schedule used by respondents reportedly sets forth the local agreements between labor and the involved railroads as of July 1, 1977.

The difference between protestant's and respondents' cost, with respect to station clerical expenses, is $12.45 per car. Protestant used an unsupported $1.25 per car. Respondents used the Ex Parte No. 270 (Sub No. 4), *Investigation of Railroad Freight Rate Structure—Coal* method which assigns 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. Respondents add that these expenses include more than the simple preparation of the waybill. Included are items related to car handling and train movement such as preparation of wheel reports, bad order reports, timekeeping reports, crew calling, track checking, and car handling recordkeeping. Consequently, respondents consider protestant's $1.25 inadequate.

5. *Car ownership costs.*—Respondents acknowledge that the proposed rate applies only on shipper-owned cars. Currently, the capital and maintenance cost for an open-top, solid-bottom rotary coupler, high-rise gondola is $2.21 per ton. No use has been made of this cost by any of the parties. Apparently it was included for information only.

In addition to the above major points ,between protestant and respondents in computing the cost of the unit-train coal movement, the following items, having a minor effect on costs, have allegedly been corrected in respondents' own computation of costs.

To develop their variable cost of $12.65 per ton, respondents applied Rail Form A separately to the 1976 expenses and statistics of the BN, C&S, FW&D, and AT&SF. Costs were updated from the average year 1976 to July 1, 1977, through use of procedures outlined in ICC Statement No. 2-58, *Rail Carload Cost Scales by Territories as of Jan. 1, 1958,* and through use of the AAR *Indexes of Railway Material Prices and Wage Rates,* Series Q-MPW-95, the *Supplement to the Indexes of Railroad Material Prices and Wage Rates,* Series Q-MPW-94, and data pertinent to the BN and AT&SF. The index factors used were:

BN----------------------------------	1.0949
C&S--------------------------------	1.0815
FW&D------------------------------	1.0923
AT&SF -----------------------------	1.0961

The use of shipper-owned freight cars required the elimination of all expenses related to car ownership from the gross ton-mile expense.

The Rail Form A locomotive unit-mile expense was adjusted by removal of the "locomotive investment terms." An additional adjustment of the system average cost was made to better reflect the differences in operating expense between six-axle locomotives and four-axle locomotives.

To permit separate treatment of the incremental investment in cabooses, all caboose investment expense was removed from the train-mile other portion of the gross ton-mile cost. This includes a reduction to account 329, Dismantling Retired Equipment. Further, the terminal portion of train supplies and expenses, and the special service expenses have also been omitted.

The allowance for loss and damage claim payments was based on the weighted average of the 1976 loss and damage expense rate per ton of coal originated and terminated by the BN and AT&SF.

Respondents' costs reflect 9.9 hours of yard switching time. This is composed of 1 hour at Alliance, Nebr., 3.5 hours at Denver, Colo, 2.5 hours at Amarillo, Tex., 1.4 hours at Temple, Tex., and 1.5 hours of bad order yard switching. The hours for Temple are caused by processing 500-mile inspection defects and moving the RCE slave locomotive units to the head end of the train on the return trip. Based on prior experience, the BN should expect 1.70 incidents per train and the AT&SF 0.57 incidents. Including the times for moving a bad ordered car to the rip track and placing the repaired car in a succeeding train, each bad ordered car averages 40 minutes of switching time. Multiplied by the anticipated bad order incidents per train, the result is 68.1 minutes per train on the BN and 22.7 minutes per train on the AT&SF, or 90.8 minutes total.

In lieu of using the Rail Form A road train to industry switching expenses, defendants have developed their own estimate of the added expense of loading and unloading the unit-coal train with railroad-owned locomotives. They have constructed an engine-minute unit cost which excludes all motive power investment and crew wages. Also, excluded were all "yard-specific expenses," and the road property and land investment allocated to train switching.

Shown below in table 3, is a summary of respondents' total variable and fully allocated cost for the issue traffic.

TABLE 3

Respondent railroads' costs for the unit coal train movement (cost per carload)

Item	Ex penses	Road	Equip- ment	Total
BN—Origin terminal----------------------------------	$7.91	$.91	$.01	$8.83
BN—Line haul --	244.94	54.21	1.94	301.09
C&S—Line haul--	232.23	28.94	1.00	262.17
FW&D—Line haul --------------------------------------	246.28	52.26	1.65	300.19
AT&SF—Line haul--------------------------------------	163.39	30.79	1.44	195.62
AT&SF—Destination terminal ----------------------	7.56	1.13	.02	8.71
Loss & damage expenses ----------------------------	.84	---	---	.84
Incremental capital investment—1977--------------	---	53.87	179.87	233.74
Incremental capital investment—1976--------------	---	16.80	—	16.80
Variable cost per carload ----------------------------	903.15	238.91	185.93	1,327.99
Variable cost per net ton -----------------------------	8.601	2.275	1.771	12.647
Ton and ton-mile basis:				
Fully allocated cost per carload--------------------	1,479.33	417.23	185.93	2,082.49
Fully allocated cost per net ton--------------------	14.089	3.974	1,771	19.833
Ratio or dollar basis				
Fully allocated cost per carload--------------------	1,187.76	407.15	185.93	1,780.84
Fully allocated cost per ton ------------------------	11,312	3.878	1.771	16.960
Proposed rate per ton---------------------------------		$16.54		

III. PROTESTANT'S REBUTTAL OF RESPONDENTS' COST EVIDENCE

The difference between respondents' variable cost of $12.647 per ton and protestant's variable cost of $8.612 per ton is $4.04. Of the $4.04 difference, $0.86 is caused by differences in viewpoints between the parties with respect to operating characteristics and the related treatment of Rail Form A unit costs. The remaining $3.18 difference is caused by two additives used by respondents. One additive incorporates into variable costs a profit-orented rate of return on common equity. The other establishes the investment in locomotives and roadway through an incremental theory. Protestant maintains that both additives are contrary to accepted costing procedures.

Protestant argues that railroads are continually retiring and adding road freight locomotive units. To support its position protestant made a field study which indicated that the railroads do not purchase locomotives and assion them to a specific sevice. Protestant's study results also show that respondents' locomotive units are not assigned exclusively to unit-coal train services. The study showed that locomotive units utilized on the San Antonio unit-coal train averaged 4 years of age. They were not purchased new and assigned exclusively to the San Antonio train as respondents maintained in docket No. 36180, *supra*. Instead, protestant maintains, new locomotive units are placed into pools which service all traffic

Protestant maintains that none of respondents' many witnesses directly discuss the subject of capital investment in the track structure as required by the subject unit coal train. Respondents' witnesses have made investment projections by line segment of the improvements which they claim will be needed as a result of new coal traffic added after 1975. Protestant objects to the distinction between "old" and "new" coal traffic. Protestant further argues that the improvements, many of which have already taken place, benefit all traffic moving over the main line.

Exhibit LEP-8 of protestant's rebuttal statement consists of 24-pages showing the differences between respondents and protestant, in traffic and operating factors, development of line-haul variable costs, development of terminal variable costs, development of capital costs, and total variable costs.

There is no difference between respondents and protestant in the tare weight, average load per car, cars per train, round trip train-miles, or round trip gross ton-miles used in computing costs, nor in the loss and damage cost per carload, and the helper service cost per carload. Differences exist in all other items. Most of these differences have already been set forth in the sections containing the parties initial presentations and will be discussed under our comments.

IV. OUR EVALUATION OF THE COST EVIDENCE PRESENTED

Both protestant and respondent railroads used applications of Rail Form A to the 1976 expenses and statistics of the BN, C&S, FW&D, and AT&SF as the basis for their cost studies. The Rail Form A data were adjusted to reflect various operating characteristics of the subject traffic. Different points of view on these operating characteristics and differences in the allowance for the cost of capital and in incremental investment account for the differences in variable costs. The points of agreement and disagreement are evaluated below:

(1-4) No differences between protestant and respondents exist in determining the tare weight of the freight cars, the average load per car, the number of cars per train, and the round trip train-miles.

(5) Differences do exist in the round trip diesel-unit miles. Respondents include six diesel-electric locomotive units between Fort Worth and the plant, whereas protestant includes only five units on the AT&SF. Also, protestant aruges that the railroads in applying costs used seven locomotive units for the round trip movement over the C&S and FW&D instead of seven units in the loaded direction and six units in the empty direction. Consequently, costs were applied to 11,228 unit-miles rather than 10,085 for this segment, resulting in an inflated cost of $11.73 per carload.

Comments:

After inspection of exhibit JAD-2 of respondents' reply (an estimate of tonnage ratings), we believe that six units will be needed between Fort Worth and the plant in order to maintain proper speed and avoid delaying other trains. On the other hand, we believe that costs for only six units should be included for the empty movement over the C&S and FW&D from Fort Worth to Denver. Respondents' costs must be consistent with their statements of facts in the proceeding, i.e., only six units are needed for the movement over this segment of the trip.

(6) There are no differences between respondents and protestant in the computation of round trip gross ton-miles.

(7) Respondents included 9.9 hours of yard switch engine time whereas protestant included only 9.2 hours. The difference of an additional 0.1 hour on the FW&D and an additional 0.6 hour on the AT&SF is caused by differences of opinion over the number of locomotive units used on the AT&SF and the amount of time required to switch any bad order cars.

Comments:

We believe that respondents' 9.9 hours of yard engine switching time is a better estimate of the switching of the proposed unit coal train. Part of the difference in switching time is caused by differences of opinion over the number of locomotive units that will be used on the AT&SF. We believe that the AT&SF is correct in stating that six units are necessary to maintain adequate speed and to avoid delays to other trains. Consequently, the AT&SF's estimate of the time to switch these units is proper. The remainder of the difference is caused by estimated bad order switching time. Again we believe the railroads are correct based upon the aforementioned calculations presented on this subject. Protestant's reduced time is based on Commission recognition of time spent by car inspectors at destination plants. Such time has not been shown to be applicable to the unit coal train movement at issue.

(8) Respondents include 10.5 hours of road engine switching time while protestant includes nothing. Protestant states that its "variable costs include all variable operating expenses incurred by the railroads for moving this coal, including the time and mileage during loading and unloading the unit trains."

Comments:

Respondents' inclusion of the switching time by road locomotives is acceptable as will be discussed under item 16, herein.

(9) Respondents' $666.12 for the gross ton-mile cost per carload was based on their 1976 unit costs updated to July 1977. These unit costs include before tax embedded cost of capital rates of 19.31 percent for the BN, 19.28 percent for the C&S, 19.27

percent for the FW&D, and 19.56 percent for the AT&SF. These equate to an after tax rate of 11 percent. The return on road property and return on equipment costs for each railroad were increased by the following ratios to reflect the aforementioned embedded cost of capital rates BN—3.53, C&S—3.84, FW&D—3.43, and AT&SF—3.19. Respondents excluded net rents, nonrevenue freight car depreciation and nonrevenue freight car retirements. The unit costs were multiplied by the round trip gross ton-miles per car. Protestant's $545.18 for the gross ton-mile cost per carload was developed by applying the individual railroad's 1976 Rail Form A unit costs updated to July 1977 to the round trip gross ton-miles. Locomotive net rents and nonrevenue freight car expenses and return were excluded.

Comments:

Respondents use of a 11 percent after tax rate of return on the original cost basis is not acceptable for cost purposes. In recent years, the Commission has recognized only original costs less depreciation, i.e., net investment, as the method of determining the rate base. In accordance with its decision in docket No. 34013, ***Rules to Govern the Assembling & Presenting of Cost Evidence***, 337 I.C.C. 298, 393, the actual interest rate the railroads are paying on their existing debt is the proper rate to be applied to debt plus equity capital in determining variable costs. Accordingly, our restatement of the estimated cost reflects an allowance for cost of capital on the net investment basis utilizing the various embedded debt rates submitted by protestant. While respondents' use of the 11 percent after tax rate is not acceptable ***from a cost standpoint***, such a rate may be allowable based on the Commission's decision in docket No. 34013, ***supra***, in determining a revenue need level or allowance for profit.

(10) Respondents' cost of $194.20 for the locomotive unit-mile cost per carload includes the same rates of return on embedded capital as did their gross ton-mile cost per carload. Protestant's $120.92 cost was based solely on Rail Form A procedures. Both parties excluded locomotive cost of capital and depreciation which are applied separately on a direct basis. Protestant also objects to the railroads' method of computing the diesel-electric unit-mile cost, which it contends inflates the cost by $56.28 per carload. Other objections were directed at respondents inclusion of costs for excess number of locomotive units resulting in an additional overstatement totaling $16.82.

Comments:

Protestant's calculation of the locomotive unit-mile cost per carload more nearly portrays this item although it is understated by $5.09 per carload. Respondents' return on the embedded cost of capital is the same as for their gross ton-mile cost per carload and is rejected from a cost standpoint, as explained in item 9, herein. Respondents' adjustment to reflect the differences in operating expenses between six-axle locomotives and four-axle locomotives is unacceptable. We agree with respondents' assumption that the weight differential between four-axle and six-axle locomotives would result in a higher cost using the latter. However, we do not believe respondents have adequately supported an increased cost in the magnitude of $56.28 per carload. Protestant also objects to respondents' inadvertent use of seven locomotive units in both directions on the C&S and FW&D. We concur in this objection since respondents stated that only six locomotives were needed but then used seven in developing their cost. We cannot concur in protestants' objection to the railroads' inclusion of a sixth locomotive unit at a cost of $5.09 per carload between Fort Worth and the plant. Respondent has adequately demonstrated the need for this additional unit.

(11) Respondents' crew cost per carload of $134.37 does not differ significantly from protestant's $122.44. Protestant makes several general criticisms of respondents' computation of crew wages.

Comments:

The record does not show in a clear and concise manner the step-by-step computations of crew wages by either party. Further, we do not believe that protestant has adequately explained or supported its criticisms. Therefore, since it would appear that the railroads should be aware of what its requirements and limitations are, and to insure that our restated costs are not understated, we have used respondents' cost in our restatement.

(12) Respondents include $28.04 for the train-mile (other) cost per carload while protestant includes $27.64. Respondents' cost was based on the railroads' 1976 unit costs updated to July 1977 with before tax rates of return on embedded capital of 19.31 percent for the BN, 19.28 percent for the C&S, 19.27 percent for the FW&D, and 19.56 for the AT&SF. The caboose cost of capital and depreciation were excluded and computed separately. The unit costs were multiplied by the round trip train miles and divided by the cars per train. Protestant's cost were computed in the same manner except that protestant followed the Rail Form A procedures.

Comments:

Protestant cost is used in our restated cost. Respondents' approach is unacceptable from a cost standpoint, as previously explained in our discussion of the cost per gross ton-mile, item 9, herein.

(13) Respondents' car inspection cost per carload of $16.90 is almost identical to protestant's $16.91.

(14) Respondents' cost for train supplies and expenses—running per carload of $18.60 is very close to protestant's $18.58.

(15) Respondents' switching cost per carload of $7.55 differs from protestant's $6.19. Respondents cost was based on 1976 costs indexed to July 1977 with the previously noted before tax rates of return on embedded capital and increased for 5.40 nonrevenue minutes. Protestant's cost was also based on 1976 costs indexed to July 1977, but was computed without the additional return and with only 5.01 nonrevenue minutes per carload.

Comments:

As discussed under item 7, we have accepted respondents' switching time. However, for reasons given under our discussion of the cost per gross ton-mile, item 9 herein, we reject respondents' cost per switch engine minute. Our restatement is based on respondents' estimates of the minutes multiplied by protestant's cost per switch engine minute.

(16) Respondents have included $2.45 for their road engine switching cost per carload. The railroads adjusted the Rail Form A cost per switch engine minute and applied the results to the 10.5 hours for switching the train at the mine, on line and at the plant. Protestant included no cost for switching by road locomotives contending that since the round trip train-miles, diesel unit-miles and gross ton-miles include the complete movement from origin to destination and return, respondents adjustment amounts to a double count of the variable costs.

Comments:

As respondents state, neither protestant's gross ton-mile expense factor no their own modified gross ton-mile factor reflect the switching performed by road crews at either origin or destination. Consequently, the railroads' inclusion of this cost is acceptable. Protestant has made no statement as to the manner in which the inclusion of this cost item results in a double count. It is our opinion that none of the cost attributes included by protestants reflect switching by road crews. Consequently, respondents' cost of $2.45 per carload is acceptable.

(17) Respondents' carload claims clerical cost per carload of $2.14 exceeds protestant's $1.92 because of respondents' inclusion of the return on embedded capital of 19.31 percent for the BN and 19.56 percent for the AT&SF. Protestant follows the Rail Form A procedures.

Comments:

Protestant's calculations are preferable to respondents for reasons previously stated under item 9, herein.

(18) Respondents' $13.70 station clerical cost per carload greatly exceeds protestant's $1.25. Respondents' cost is based on the 1976 unit cost indexed to July 1977 with before tax rate of returns on embedded capital of 19.31 percent for the BN and 19.56 percent for the AT&SF. Respondents used the Ex Parte No. 270 (Sub-No. 4), *supra*, method in assigning 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. The 25 percent was divided by 110 cars and the quotient added back to the 75 percent. Protestant maintains that its $1.25 per car, which is over $652,000 annually, more than compensates the railroads for the costs incurred.

Comments:

Respondents' methodology is more acceptable. As the railroads point out, billing is only a small portion of the station clerical cost. Our own internal studies indicate that 25 percent of the station clerical cost is associated with the shipment and only that part of the station clerical cost varies with the number of cars transported on one bill of lading. Protestant's $1.25 is little more than a rough estimate. We find respondents cost to be the better estimate except that it includes an excessive return on investment as explained in item 9, herein. We have therefore attempted to restate respondents' return portion of this item to reflect the approximate actual embedded debt rates.

(19) Both respondents and protestant agree on $0.84 for the allowance for loss and damage claim payments per carload.

(20) Respondent's $0.87 cost per carload for helper service at Belle Ayr, Wyo., and Crawford, Nebr., was accepted and used by protestant. Thus, there is no dispute regarding this item.

(21-24) Respondents and protestant differ greatly in their handling of the added capital costs included in the variable cost of moving the unit coal train. Capital costs included by the parties were:

	Respondent	Protestant
Locomotive diesel unit capital cost (return and depreciation) per carload	$177.55	$41.31
Cabbose capital cost (return and depreciation) per carload	2.31	0.36
Fixed plant investment—1977 per carload	53.86	0
Fixed plant investment—1976 per carload	16.80	0

(a) ***Locomotive diesel unit cost per carload.***—To support its locomotive diesel unit capital cost (return and depreciation) per carload of $171.55, respondents argue that the BN must purchase 53 diesel-electric locomotive units and the AT&SF 16 locomotive units. System average motive power availability for six-axle locomotives is approximately 85 to 87 percent, excluding units stored either servicable or unservicable. Some provision must be made for locomotives while units are out of service for maintenance and Federal inspection. Protestant argues that the BN will purchase only 50 units and the AT&SF 15 units. We believe that since the locomotives will be placed in the general pool of motive power, and available units, new or old, used for the HL&P unit coal train, as protestant argues, that protestant's determination of motive power needs is the better estimate.

Respondents used an 11 percent after-tax capital cost to develop the annual capital cost of equipment in conjunction with a 15-year service life and zero percent net salvage value. To determine the unit capital cost respondents used annuity rates of 0.208 for the BN and 0.210 for the AT&SF to recognize both capital recovery (depreciation) and the cost of capital. The 11 percent after-tax capital cost converts to a before-tax rate of 19.31 percent for the BN and 19.56 percent for the AT&SF.

Protestant computed its return at 7.85 percent based on the average for equipment trust certificates from respondents' underlying workpapers. Annual depreciation of 3.92 percent for the BN and 4.30 percent for the AT&SF was based on each railroad's 1976 Annual Report to the Commission. Incremental locomotive return monies related to the subject movement were added to each railroad's total annual locomotive return monies. In the same fashion the incremental diesel unit-miles and gross ton-miles were added to 1976 system totals. The resulting increased gross ton-mile and diesel unit-mile unit costs indexed to July 1977 were then separately multiplied by the round trip gross ton-miles and round trip diesel unit-miles and divided by the cars per train. The result was protestant's locomotive diesel unit cost (return and depreciation) of $41.31 per carload.

The following excerpt is taken from docket No. 34013, *supra*, "Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking ***. However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees with the

explanation of the Cost Finding Section as to why equity capital invested in carriers' facilities should be treated in the same manner as similar debt."

Therefore, we accept protestant's cost of $41.31 since we believe the 7.85 percent is more indicative of the "current" embedded debt rate. Again, based on docket No. 34013, *supra*, a higher rate may be allowable, not from a cost standpoint, but from an allowance for profit standpoint.

(b) *Caboose capital cost per carload.*—Both respondents and protestant based their caboose capital cost per carload on the purchase of 11 new cabooses. However, respondents developed a capital cost of $2.31 per carload whereas protestant developed a capital cost of only $0.36 per carload.

Respondents amortized the $51,000 cost of each caboose assuming a 15-year service life and an annuity rate of 0.208 for the BN and 0.210 for the AT&SF. The annuity factor was based on an 11 percent after-tax cost of capital, and statutory tax rates.

Protestant used the same 7.85 percent return as for locomotive diesel unit capital cost development. Annual depreciation of 3.11 percent for the BN and 3.23 percent for the AT&SF was based on each railroad's Annual Report to the Commission. Based on these assumptions, protestant added the incremental annual caboose depreciation and return monies to the monies included in their Rail Form A's. The resulting units costs were divided by each carrier's Rail Form A system train miles. After updating the resultant unit costs to July 1977, these unit costs were applied to the round trip train miles for the movement. These computations provided protestant's caboose capital cost per carload of $0.36.

We accept protestant's cost of $0.36 based on the 7.85 percent return as being the proper rate for establishing the variable cost. Our reason for this action is the same as our reason for accepting protestant's locomotive diesel unit cost (return and depreciation) cost per carload.

(c) *Fixed plant investment—1976 and 1977.*—Respondents include $16.80 per carload for their fixed plant investment in 1976 and $53.86 per carload for their fixed plant investment in 1977. Protestant included nothing for fixed plant investment.

Respondents argue that the weight of the cars and length of the unit coal trains place considerable stress on the track structure thereby lessening its life. These incremental costs are assigned exclusively to *all* unit coal trains under the belief that shippers not benefiting from them should not have to pay for the improvements. They are assigned to all such coal traffic, not merely HL&P coal trains. Protestant argues that none of respondents' witnesses directly discuss the subject of capital investment in the track structure as required by the HL&P unit coal trains. Protestant contends that respondent distinguishes between "old" and "new" coal traffic and assigns costs for these improvements only to traffic gained since 1975. Protestant further maintains that all traffic moving over the lines will benefit from the improvements.

In the *San Antonio* case, docket No. 36180, *supra*, the Commission included as cost, the expense for plant expansion allocated to the issue traffic. Since the Commission accepted this amount, therein, even though it covered more than the cost falling within the restrictive construction given to costs in docket No. 34013, *supra*, we will accept respondents' $53.86 and $16.80 in this proceeding also.

Table 4 is a summation of respondent railroads' itemized costs, protestant's itemized costs, and our restatement. Most lines contain the itemized cost at the right of the column with the expense portion above the return portion at the left.

TABLE 4

Comparison of respondents', protestant's and our restated costs for the unit coal train movement (expense, return and variable cost itemized per carload)

	Respondents		Protestant		Our restatement	
Line-haul variable costs						
Gross ton-mile	$496.56		$496.40		$496.40	
	169.56	$666.12	48.78	$545.18	48.78	$545.18
Locomotive unit-mile	192.86		120.65		125.74	
	1.34	194.20	.27	120.92	.27	126.01
Crew		134.37		122.44		134.37
Train-mile (other)	27.69		27.54		27.54	
	.35	28.04	.10	27.64	.10	27.64
Car inspection		16.90		16.91		16.91
Train supplies and expenses		18.60		18.58		18.58
Switching—yard	6.59		5.95		6.57	
	.96	7.55	.24	6.19	.24	6.81
Road engine switching	2.33			0	2.33	
	.12	2.45		0	.12	2.45
Terminal variable costs						
Carload claims clerical	1.84		1.83		1.83	
	.30	2.14	.09	1.92	0	1.92
Station clerical	12.02		1.25		12.02	
	1.68	13.70	0	.125	.70	12.72
Loss and damage		.84		.84		.84
Helper service		.87		.87		.87
Capital costs						
Locomotive diesel unit		177.55	29.46		29.46	
			11.85	41.31	11.85	41.31
Caboose		2.31	.26		.26	
			.10	.36	.10	.36
Fixed plant investment—1977		53.86		0		53.86
Fixed plant investment—1976		16.80		0		16.80
Total variable cost per carload		1,336.30		904.41		1,006.63
Total variable cost per ton		12.73		8.61		9.59
Fully allocated cost per ton on ratio method[1]		[2]16.96				12.86

[1]Variable cost assumed to be 74.57 percent of fully allocated costs based on exhibit JAD-7 of respondents' reply statement.

[2]Based on respondent's original variable cost of $12.647.

V. SUMMARY

Our restatement produces a total variable cost of $9.59 per ton. Based on this variable cost, we have computed a fully allocated cost of $12.86 per ton using the ratio or dollar method.

APPENDIX C

Western unit coal train movements

Origin (1)	Destination (2)	Tariff RR (3)	Reference ICC No. (4)	Annual volume (5)	Route (6)	Minimum tons per train (7)	Miles (8)	Rate[2] per ton (9)	Mills per ton mile (10)	Car ownership (11)
Protestant										
1. Belle Ayr, Wyo----	Pueblo, Colo --------	BN	178	1,670,000	BN-CS	10,500	595	4.55	7.65	Shipper
2. Do ----------------	PL. Gibson, Okla ---	BN	380	2,700,000	BN-MP	10,000	1,142	8.34	7.30	Do.
3. Do ----------------	Amarillo, Tex -------	BN	304	750,000	BN-CS-FWD	10,335	942	7.49	7.95	Do.
4. Do ----------------	Welsh, Tex ----------	BN	419	1,650,000	BN-KCS-LA	10,290	1,474	10.65	7.23	Do.
5. Cordero, Wyo------	Elmendorf, Tex------	BN	411	2,700,000	BN-CS-FWD-SP	10,808	1,644	11.37	6.92	Do.
6. Belle Ayr, Wyo----	Jeffrey, Kans---------	BN	461	2,000,000	BN-CP	10,600	764	5.58	7.93	Do.
Average --------------------------------				1,911,666		10,422	1,084	8.00	7.50	
Respondent										
1. Belle Ayr, Wyo----	Amsterdam, Mo -----	BN 259	416	1,600,000	BN-KCS	10,500	873	[3]8.53	9.8	Shipper
2. Gallup, Minn-------	Joseph City, Ariz ---	ATSF 9373-N	15347	1,200,000			117	3.33	28.46	
3. Do ----------------	Trona, Calif----------	ATSF 15661	15360	375,000			749	11.77	15.71	
4. Do ----------------	Joseph City, Ariz ---	ATSF 9373-N	15347	800,000			117	3.74	31.97	
5. Converse, Colo----	Gary, Ind ------------	DRGW 7576	1264	600,000			1,465	[3]16.88	10.66	
Proposed										
Cordero, Wyo --------	Smithers Lake, Tex-			5,200,000	BN-SF	10,500	1,607	[1]15.60 16.54	9.7 10.3	Shipper

[1]Data presented is based on evidence presented by the parties.
[2]Rates submitted by protestant are current as of July 15, 1977.
[3]Effective October 1977.
[4]Respondents alternative proposed rate.

APPENDIX D

Respondent's additional maintenance-of-way cost

The additional maintenance-of-way expenses, over and above the system Rail Form A formula expenses, due to long heavy coal unit-trains are estimated by respondents to be $110 per million gross ton-miles. These added expenses have been developed for the route of HL&P coal unit-train, based on the projected 1979 coal tonnages.

The HL&P coal movement will generate 9,160,000 gross tons per mile to deliver 5,200,000 net tons. The additional maintenance-of-way per unit is then:

9.36 million gross-tons x $110/mgt. = $1,029.60

For each of the BN-family lines

BN: $1,029.60 x 505.5 miles = $520,462.80
$\frac{\$520,462.80}{5,200,000}$ = $0.10 per net ton

C&S: $1,029.60 x 348.7 miles = $359,021.52
$\frac{\$359,021.52}{5,200,000}$ = $0.07 per net ton

FWD: $1,029.60 x 452.9 miles = $466,305.84
$\frac{\$466,305.84}{5,200,000}$ = $0.09 per net ton

EQUIPMENT INVESTMENT

HL&P coal unit-train (1977 investment only)

Burlington Northern, Inc. (BN, C&S and FW&D)	(77.2% Pro rata Share)[1]		
Locomotives (15% Contingency)	69 x 0.772	= 53 units	
		$603,700 per unit x 53 units	= $31,996,100
Waycars (10% Contingency)	11 x 0.772	= 8 units	
		$51,000 per w/c x 8	= 408,000
Total BN Family			$32,404,100
Annuity Rate	0.207719		
Annual Requirement		0.20779 x $32,404,100	= $6,730,936.92
Annual Volume			5,200,000
Cost Per Ton		$6,730,936.92/5,200,000	= 1.294/Ton

See footnote at end of table.

EQUIPMENT INVESTMENT--Continued

HL&P coal unit-train (1977 investment only)--Continued

Santa Fe	(22.8% Pro rata Share)[1]		
Locomotives (15% Contingency)	69 x .228	= 16	
		$639,000 per unit x 16 units	= $10,224,000
Waycars (10% Contingency)	11 x .228	= 3	
		$51,000 per unit x 3	= 153,000
Total ATSF			10,377,000
Annuity Rate	0.210002		
Annual Requirement		0.210002 x $10,377,000	= $2,179,195.20
Annual Volume			5,200,000
Cost Per Ton		$2,179,195.20/5,200,000	= $0.419

Composite Totals	
Cost Per Ton	
BN, C&S and FWD	$1.294
Santa Fe	0.419
Total	1.713

See footnote at end of table.

EQUIPMENT INVESTMENT--Continued

HL&P coal unit-train (1977 investment only)--Continued

Composite Totals--Continued	
Cost Per Carload	
BN, C&S and FWD	
$1.294 x 105 tons/car	$135.913
Santa Fe	
$0.419 x 105 tons/car	43.995
	$179.908

[1]Pro rata shares based on schedule hours
BN, C&S and FWD
$135.75 \div 175.75 = 0.772$
Santa Fe
$40 \div 175.75 = 0.228$

Fixed plant investment HL&P coal train (1977 investments only)

Burlington Northern, Inc. (C&S and FWD)	Total I.O.E.	Total A&B	HL&P pro rata share I.O.E.	HL&P pro rata share A&B	HL&P I.O.E.	HL&P A&B	HL&P Total
Roadway							
BN	$7,020,100	$34,102,785	0.1892	0.1721	$1,328,152	$5,869,441	$7,197,593
C&S	4,675,200	3,599,700	0.4210	0.4210	1,968,259	1,515,474	3,483,733
FWD	4,200,800	3,035,200	0.4419	0.4542	1,856,182	1,378,548	3,234,730
Total	15,896,100	40,737,685	0.3241	0.2151	5,152,593	8,763,463	13,916,056
Net present value of accelerated I.O.E.					$3,856,865		
Annuity rates					0.125576	0.198830	
Annual requirement					$484,330	$1,740,451	$2,224,781
Annual volume (tons)							5,200,000
Cost per ton							$0.427
Structures							
Alliance diesel shop	----------------	$8,522,900	0.15497	0.15497	----------------	$1,320,800	$1,320,800
Annuity rates					0.125576	0.195835	
Annual requirements					----------------	$258,658	$258,658
Annual volume							5,200,000
Cost per ton							$.050
Total Burlington Northern, Inc							

Fixed plant investment HL&P coal unit-train (1977 investments only)—Continued

Burlington Northern, Inc. (C&P and FWD)	Total I.O.E.	Total A&B	HL&P pro rate share I.O.E.	HL&P pro rate share A&B	HL&P I.O.E.	HL&P A&B	HL&P Total
Santa Fe							
Roadway TCS on siding at Thompson	$126,900	$358,100	0.9455	0.9455			
East leg of Wye Track	15,800	537,500	0.9455	0.9455			
Rehabilitate 11,966 TF	-Compl-	-Compl-	------------	------------			
Total	$141,700	$895,600	0.9455	0.9455	$133,977	$846,790	$980,766
Annuity rates					0.125576	0.201250	
Annual requirement					$16,824	$170,416	$187,240
Annual volume (tons)							5,200,000
Cost per ton							$.036
Total cost per ton							$.513
Total cost per car (105 tons per car)							$53.86

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-2070

HOUSTON LIGHTING & POWER COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Respondents*

BURLINGTON NORTHERN, INC., *Intervenor*

And Consolidated Case No. 77-2071

BEFORE: Bazelon, Senior Circuit Judge: Leventhal and Robb, Circuit Judges

ORDER

The petitions for rehearing filed by petitioners (Houston Lighting & Power Company, et al.) and by the State of Texas, as amicus curiae, having been considered by the Court, and it appearing that the aforesaid petitions are based on actions and inactions of the Interstate Commerce Commission in other dockets which are not before the Court in these petitions for review and which may be the subject of separate judicial proceedings, it is

ORDERED, by the Court, that the aforesaid petitions for rehearing in the above referenced case are denied.

Per Curiam

FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 77-2070

HOUSTON LIGHTING & POWER COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Respondents*

BURLINGTON NORTHERN, INC., *Intervenor*

And Consolidated Case No. 77-2071

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestions for rehearing *en banc* filed by petitioners' (Houston Lighting & Power Co., et al.) and by the State of Texas, as amicus curiae, having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc,* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher, Clerk

Circuit Judge Tamm did not participate in the foregoing order.

APPENDIX F

APPENDIX F

Section 101(b)

Section 101(b) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("*4-R Act*") P.L. 94-210, 90 Stat. 31, 33, reads as follows:

(b) Policy.—It is declared to be the policy of the Congress in this Act to—

(1) balance the needs of carriers, shippers, and the public;

(2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises;

(3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets;

(4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;

(5) promote separate pricing of distinct rail and rail-related services;

(6) formulate standards and guidelines for determining adequate revenue levels for railroads; and

(7) modernize and clarify the functions of railroad rate bureaus.

Section 205

Section 205 of the *4-R Act,* 90 Stat. 31, 41, reads as follows:

Sec. 205. Section 15a of the Interstate Commerce Act (49 U.S.C. 15a) is amended—

(1) by adding at the end of paragraph (2) and at the end of paragraph (3) the following new sentence:

"This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by redesignating paragraph (4) as paragraph (6), and by inserting immediately after paragraph (3) the following new paragraph:

"(4) With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate.".

Section 206

Section 206 of the *4-R Act*, 90 Stat. 31, 41, reads as follows:

Sec. 206. Section 15 of the Interstate Commerce Act (49 U.S.C. 15), as amended by section 202 of this Act, is

amended by adding at the end thereof the following new paragraph:

"(19) Notwithstanding any other provision of law, a common carrier by railroad subject to this part may file with the Commission a notice of intention to file a schedule stating a new rate, fare, charge, classification, regulation, or practice, whenever the implementation of the proposed schedule would require a total capital investment of $1,000,000 or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. The filing shall be accompanied by a sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based. Any interested person may request the Commission to investigate the schedule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 1,* 2, 3, or 4 of this part, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carrier.".

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* Added to § 15(19) by § 220(m) of the Rail Transportation Improvement Act, 90 Stat. 2613, 2630.

APPENDIX G

APPENDIX G

Coal Rate Cases Currently Pending Before The ICC

Docket No. 37135 F, Increased Rates on Coal, BN Montana to Superior, Wisconsin

Docket No. 37135 (Sub-No. 1) F, Increased Rates on Coal, BN Montana to Cohasset, Minnesota

Docket No. 37153, Minnesota Power and Light Company v. Burlington Northern Inc.

Docket No. 37162, The Cleveland-Cliffs Iron Company v. Burlington Northern Inc.

Docket No. 37169, Detroit Edison Company v. Burlington Northern Inc.

Docket No. 37276, Coal, Wyoming to Redfield, Arkansas

Docket No. 37226, Incentive Rate on Coal, Axial, Colorado to Coleto Creek, Texas

APPENDIX H

APPENDIX H

Petitions For Review Filed In U.S. Circuit Courts From ICC Coal Rate Decisions

Southwestern Electric Power Company v. *I.C.C. and United States*, No. 79-2701 (5th Cir., filed July 23, 1979)

Southwestern Electric Power Company v. *I.C.C. and United States*, No. 79-2082 (5th Cir., filed May 3, 1979)

Burlington Northern, Inc. and Kansas City Southern Railway Company v. *United States and I.C.C.*, No. 79-1547 (D.C. Cir., filed May 25, 1979)

Southwestern Electric Power Company v. *I.C.C. and United States*, No. 79-2082 (5th Cir., filed May 3, 1979)

Systems Fuels, Inc. and Arkansas Power & Light Co. v. *United States and I.C.C.*, No. 79-2491 (5th Cir., filed June 22, 1979)

Nevada Power Company v. *I.C.C. and United States*, No. 79-7504 (9th Cir., filed October 1, 1979)

Utah Railway Company v. *United States and I.C.C.*, No. 79-2059 (10th Cir., filed September 28, 1979)

Union Pacific Railroad Company v. *United States and I.C.C.*, No. 79-1840 (10th Cir., filed August 17, 1979)

San Antonio, Texas Acting by and through its City Public Service Board v. *United States and I.C.C.*, No. 78-2051 (D.C. Cir., filed October 25, 1978)

Burlington Northern, Inc. v. *United States and I.C.C.*, No. 78-2307 (D.C. Cir., filed December 21, 1978)

The State of Texas v. *United States and I.C.C.*, No. 78-2216 (D.C. Cir., filed November 24, 1978)

Burlington Northern Inc. v. *United States and I.C.C.*, No. 79-1712 (D.C. Cir., filed July 9, 1979)

Iowa Public Service Company v. *I.C.C. and United States*, No. 79-1550 (8th Cir., filed July 13, 1979)

Burlington Northern, Inc. and Chicago and North Western Transportation Company v. *United States and I.C.C.*, No. 79-1747 (D.C. Cir., filed July 16, 1979)

Iowa Public Service Company v. *I.C.G. and United States*, No. 79-1550 (8th Cir., filed July 13, 1979)

Iowa Power and Light Company v. *I.C.C. and United States*, No. 79-1534 (8th Cir., filed July 6, 1979)

Celanese Chemical Company, Inc. v. *United States and I.C.C.*, No. 78-3849 (5th Cir., filed December 4, 1978)

Burlington Northern, Inc. v. *United States and I.C.C.*, No. 79-2286 (D.C. Cir., filed October 26, 1979)

Burlington Northern, Inc. v. *United States and I.C.C.*, No. 79-2295 (D.C. Cir., filed October 29, 1979)

Dayton Power and Light Company v. *United States and I.C.C.*, No. 79-2088 (10th Cir., filed September 14, 1979)

Hazard Coal Operators Association v. *United States and I.C.C.*, No. 79-2245 (D.C. Cir., filed October 18, 1979)

Electric Fuels Corporation v. *United States and I.C.C.*, No. 79-2255 (D.C. Cir., filed October 19, 1979)

Tampa Electric Company v. *United States and I.C.C.*, No. 79-2300 (D.C. Cir., filed Ocotber 29, 1979)

Alabama Power Company, et al. v. *United States and I.C.C.*, No. 79-2090 (D.C. Cir., filed September 17, 1979)

Louisville and Nashville Railroad Company v. *United States and I.C.C.*, No. 79-2002 (D.C. Cir., filed August 29, 1979)

The Commonwealth of Kentucky v. *United States and I.C.C.*, No. 79-2172 (D.C. Cir., filed October 4, 1979)

Seaboard Coastline Railroad Company v. *United States and I.C.C.*, No. 79-2001 (D.C. Cir., filed August 29, 1979)

No. 79-793

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOUSTON LIGHTING AND POWER COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 606 F. 2d 1131. The opinions of the Interstate Commerce Commission (Pet. App. 1c-46c, 1d-64d) are reported at 357 I.C.C. 683 and 358 I.C.C. 537.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b) was entered on June 26, 1979. A petition for rehearing (Pet. App. 1e) was denied on August 22, 1979. The petition for a writ of certiorari was filed on November 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission correctly applied the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, in approving two proposed rates for the carriage of coal.

2. Whether the Commission's decisions were arbitrary or capricious.

STATEMENT

In these consolidated cases, the court of appeals affirmed two decisions of the Interstate Commerce Commission approving rates proposed by respondent railroads for the carriage of coal. In the first case, the Commission considered a proposed rate of $8.64 per ton for the transportation of coal from Gallup, New Mexico, to Cochise, Arizona, a trip of 523 miles. The rate was proposed in a tariff filed in June 1977 by the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and the Southern Pacific Transportation Company (Southern Pacific). In the second case, the Commission considered a proposed rate for the transportation of coal from Cordero, Wyoming, to Smithers Lake, Texas, a trip of 1,308 miles. The rate was proposed in June 1977 by Burlington Northern, Inc. and its subsidiaries (BN) and by Santa Fe. The carriers proposed to charge $15.60 per net ton (subject to an escalation formula) or, in the alternative, $16.54 per net ton (subject to general rate increases instead of an escalation formula).

In both cases, the carriers filed the proposed rates pursuant to 49 U.S.C. 10729,[1] a provision enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), which creates a new category of railroad rates called "capital incentive rates." Under Section 10729, the Commission must give expedited consideration to any proposed rate filed by a rail carrier for new services requiring a total capital investment of $1,000,000 or more. If the rate is found to be a capital incentive rate, it may not be set aside for a period of five years following the Commission's determination of lawfulness.

[1]The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, was revised by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, and codified as 49 U.S.C. 10101 *et seq.* We hereafter refer to the new sections of the Act as they will appear in the United States Code.

In its decisions, the Commission first held that the rates proposed in both cases were properly filed as capital incentive rates under Section 10729. In evaluating the lawfulness of the rates, the Commission considered evidence bearing on rates for comparable traffic, the variable and fully allocated costs of providing the services in question, and the carriers' need to attract equity capital (Pet. App. 1c-46c, 1d-64d). The Commission upheld the proposed rate of $8.64 per net ton for the movement from New Mexico to Arizona. It also sustained the proposed rate of $15.60 per net ton for the movement from Wyoming to Texas, but it held unlawful the alternative proposal of $16.54 per net ton as unreasonably high (Pet. App. 21c, 27d).

The court of appeals carefully reviewed the Commission's decisions and concluded that they were supported by substantial evidence, were consistent with statutory standards, and were accompanied by an adequate statement of the Commission's rationale (Pet. App. 21a-36a).

ARGUMENT

This case presents no conflict among the circuits or any legal issue of general importance warranting this Court's review. In substance, the Commission's decisions on the lawfulness of rates for two specific movements of

a commodity are based on the Commission's evaluation of the evidence pertaining to the rates on comparable movements, the costs of providing the particular services, and the economic return needed to attract equity capital. The court of appeals correctly held that the Commission did not exceed its broad discretion in ratemaking proceedings in resolving these factual issues.

1. At the outset, we note that despite considerable rhetoric reflecting petitioners' dissatisfaction with the Commission's decisions and the economic burdens that result from rate increases, it is difficult to determine what specific aspects of those decisions petitioners believe are erroneous and what specific legal issues they wish to present for this Court's review. The questions presented by petitioners (Pet. 2-3) do not focus on any legal errors, and much of their argument is in the same vein. Thus, petitioners object generally (Pet. 7-9, 12-14) to the Commission's reliance on the provision of the 4-R Act that requires the Commission to make a "continuing effort" to "assist [rail] carriers in attaining revenue levels" that "are adequate * * * to cover total operating expenses * * * plus a reasonable and economic profit or return (or both) on capital employed in the business" (49 U.S.C. 10704(a)(2)). But they do not dispute that such revenue levels are an appropriate consideration for the Commission in these cases, and they do not contend that the Commission relied exclusively on that consideration. Similarly, they object to the fact that these rates will be unassailable for five years under the capital incentive provisions of Section 10729 (Pet. 16-18), but they do not dispute the Commission's finding, affirmed by the court of appeals (Pet. App. 8a-20a), that these rates were properly filed as capital incentive rates under Section 10729.

In short, petitioners appear generally to claim that the Commission's decisions are arbitrary and capricious and that they do not adequately state the reasons supporting the conclusions reached. We believe such generalized and conclusory allegations are not sufficient to present any issue for this Court's review. In any event, petitioners' contentions are incorrect for the reasons summarized below and explained more fully in the decision of the court of appeals.

2. The record fully supports the court of appeals' conclusion that "the Commission's determinations * * * reflect full consideration of the evidence and the salient factors" (Pet. App. 26a). The Commission carefully evaluated several factors traditionally considered in determining the reasonableness of rail rates, including the following:

First, the Commission in both cases compared the rates proposed by the respondent railroads with other rail rates for the carriage of coal in the West. It accepted some rates as a valid basis for comparison and rejected others, explaining the reasons for its decision (Pet. App. 14c-16c, 19d-21d). The court of appeals noted (Pet. App. 27a) that this evaluation embodied a proper exercise of the Commission's expert discretion and found no basis to overturn it.

Second, the Commission evaluated both the variable and fully allocated costs of providing the transportation services to which the rates applied (Pet. App. 16c-17c, 22d-23d). The court of appeals concluded that the Commission's evaluation was supported by substantial evidence (Pet. App. 28a), and petitioners do not appear to challenge that determination here.

Finally, in determining whether the proposed rates (and the percentage by which they exceed variable and fully allocated costs) are just and reasonable, the Commission also gave consideration to the need of railroads to attract equity capital—the need for profitability that, under current economic conditions, will " 'serve as an encouragement and incentive for continued or new riskbearing ownership * * *' " (Pet. App. 22d, quoting from *Rules to Govern the Assembling and Presenting of Cost Evidence*, 337 I.C.C. 298, 393 (1970)).[2] The Commission found that consideration of this factor was consistent not only with traditional ratemaking principles but also with the provisions of the 4-R Act (49 U.S.C. 10704(a)(2)) which require the Commission to make a continuing effort to assist carriers in maintaining revenue levels sufficient to provide a reasonable return on capital (Pet. App. 15c-18c, 21d-25d).

Because Section 10704(a)(2) contemplates that the Commission will promulgate standards and procedures for establishing adequate revenue levels—a task that the Commission had not completed by the time of its decisions in these cases—the Commission declined to apply a specific formula to assess the issue of reasonable return on capital (Pet. App. 18c, 24d).[3] Rather, it relied

[2]This is similar to the familiar ratemaking principle that carriers may recover their cost plus a reasonable rate of return.

[3]Representative Eckhardt, in his brief amicus curiae, asserts (Br. 10-13) that the Commission erred in taking note of the statutory mandate to consider the railroads' need for equity capital, arguing that the Commission had not yet issued implementing rules. The affirmative requirement that the Commission implement this statutory provision by rules does not preclude its taking note of the text and purpose of the statute in rate cases decided prior to the issuance of implementing rules. Given the declared objective of the

on the need for a reasonable profit as an additional factor supporting its conclusion that two of the proposed rates were lawful. The court of appeals correctly held that this was consistent with the policies of the Act and the Commission's traditional evaluation of the reasonableness of proposed rates, which, as this Court has repeatedly recognized, is "unlike a problem in calculus, [and] cannot be proved right or wrong. [The relevant factors] are, indeed, only guides to judgment. Their weight and significance require expert appraisal." *New York* v. *United States*, 331 U.S. 284, 328 (1947). See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942): "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." For this reason, the Commission has necessarily been afforded "considerable flexibility" in ratemaking proceedings. *Baltimore & O.R.R.* v. *United States*, 345 U.S. 146, 150 (1953).

3. There is no merit to petitioners' suggestion (Pet. 9-10, 17-18) that, because other coal rate cases are pending before the Commission and the courts of appeals, this Court should review the decision below or, alternatively, should defer disposition of this case. Each of the other coal rate cases, like the present case, turns largely on its own particular facts, and each presents legal and factual issues different from this case. Furthermore, as the court below noted (Pet. App. 30a, 33a), the Commission's

statute to help the railroad industry achieve revenue adequacy, the court of appeals correctly held that the Commission properly considered the underlying statutory purpose in these cases. Moreover, as noted above, reasonable profitability was a factor relevant in ratemaking proceedings prior to the enactment of the 4-R Act.

decisions in the present case were rendered before its promulgation of revenue adequacy standards under Section 10704.[4] Finally, the capital incentive rate provision of the 4-R Act, Section 10729, which applies to these rates, requires expeditious rate determinations for the purpose of encouraging capital investment in the railroad industry. Deferring disposition of this case in the manner suggested by petitioners would frustrate the congressional objective in enacting this provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Moreover, in Ex parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure* (May 17, 1978), the Commission instituted a rulemaking proceeding to develop more precise standards and guidelines for development of the western coal rate structure. That proceeding is currently pending. Accordingly, in the present case, as in other western coal cases, the Commission's approach has necessarily been an interim one, pending the formulation of standards in the comprehensive context of Ex parte No. 347.

DOJ-1980-01

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-793

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Petitioners,

v.

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Respondents.

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BRIEF OF RESPONDENT RAILROADS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals in the decision below affirmed decisions and orders of the Interstate Commerce Commission holding that capital incentive rates proposed by the railroads for transportation of coal in unit trains to Smithers Lake, Texas (near Houston) and Cochise, Arizona, did not exceed a maximum reasonable level, and were not otherwise unlawful. The question presented is whether the Court of Appeals erred in concluding that the Commission's decisions complied with the statutory Rule of

Ratemaking[1], reflected proper consideration of the relevant rate-making factors, and were not arbitrary or capricious.

STATEMENT OF THE CASE

Railroad Respondents[2] and other railroads throughout the United States are increasingly called upon to transport large volumes of coal to the generating plants of electric utilities. To handle these coal movements in unit trains consisting of many heavily-loaded cars, the railroads must spend hundreds of millions of dollars to upgrade their lines and to purchase new locomotives for service in the unit train coal movements.[3] The need for these expenditures has arisen in a period of declining financial strength for the railroads.

In Section 206 of the 4-R Act of 1976, adding Section 15(19) to the Act (now recodified as 49 U.S.C. § 10729), Congress provided a new procedure governing proposed rates in situations where implementation of the rate proposal would require a total capital investment of $1,000,000 or more. Section 206 was intended to encourage major capital investments by assuring the railroads that if a capital incentive rate proposal was not determined by the Commission to be unlawful within 180 days, the

[1]In 1978, the *Revised Interstate Commerce Act* was enacted which, without substantive change, recodified the Interstate Commerce Act (Pub. L. No. 95-473, 92 Stat. 1337, § 3(a)). The Rule of Ratemaking for railroads, set forth in 49 U.S.C. § 15a(4), was recodified as 49 U.S.C. § 10704(a)(2). This new Rule of Ratemaking was originally enacted as Section 205 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") of 1976 (Pub. L. No. 94-210).

[2]Railroad Respondents herein are Burlington Northern Inc. (including its subsidiaries, The Colorado and Southern Railway Company and Fort Worth and Denver Railway Company), The Atchison, Topeka and Santa Fe Railway Company, and Southern Pacific Transportation Company.

[3]Unit train service is an operating system in which cars and locomotives are used in uninterrupted, round trip, shuttle-type service, and is a highly efficient method of transporting coal in large volumes. See *Potomac Electric Power Co.* v. *United States*, 584 F.2d 1058, 1061 (D.C. Cir. 1978).

railroads could proceed to implement the proposed rate, and to make the associated investment, without the risk that the capital incentive rate might thereafter (for a period of 5 years) be suspended or set aside as unlawful.

On June 3, 1977, Burlington Northern Inc. (BN) and The Atchison, Topeka, and Santa Fe Railway Company (Santa Fe) published a notice of intent to file capital incentive rates applicable to new unit train coal movements from Wyoming to Smithers Lake, Texas (near Houston), where electricity generating plants of Houston Lighting & Power Company (HL&P) are located.[4] The coal would move in unit trains of approximately 100 cars from the mine over the lines of BN and affiliated lines to Fort Worth, Texas, then via Santa Fe to the Houston destination. The total distance is 1607 miles. Annual tonnage was estimated to be approximately 5 million tons.

On June 1, 1977, Santa Fe and Southern Pacific Transportation Company (Southern Pacific) published a notice of intent to file capital incentive rates applicable to unit train movements from New Mexico to Cochise, Arizona, where electricity generating stations of Arizona Electric Power Cooperative (AEPC) are located. The total distance is 523 miles; annual tonnage was expected to be at least 1 million tons.

In the Commission proceedings in both cases, the railroads introduced testimony that they were making investments of

[4]Petitioners state that the railroads were "unwilling to discuss or negotiate their spiraling coal transportation price demands" (Petition, p. 5). That statement is not correct. The railroads and the shippers did in fact negotiate, although they were unable to reach agreement (see Court of Appeals Appendix, Verified Statements of Witnesses Davis, pp. 34-40 and Grygiel, pp. 15-17).

Likewise Petitioners' suggestion that the railroad engaged in "bait and switch" tactics is untrue (*id.*).

far more than $1 million in equipment and fixed plant improvements.[5]

In addition to demonstrating that they would invest more than $1 million because of each new movement, the railroads introduced voluminous evidence with respect to the operating characteristics of the new movements, the costs of service including capital costs, the railroads' revenue needs in light of the vast amounts of capital needed to transport the huge anticipated volumes of coal,[6] rates charged for other comparable coal movements, and other related matters. The railroads and the electric utilities disagreed as to whether the proposed rates qualified for capital incentive treatment, and also as to what were the costs of performing the service and the relationship (if any) railroad rates should bear to costs.

The Commission found in both cases that the railroads' proposed rates met the $1 million capital investment requirement under Section 15(19) (now Section 10729). It then analyzed the proposed rates in light of the railroads' revenue needs, costs of service, and rate comparisons, and concluded that the rates were within the zone of reasonableness.

The Court of Appeals, in a unanimous decision written by Judge Leventhal, affirmed the Commission's decisions and orders.

[5]Locomotives used in unit train coal service cost in excess of $500,000 apiece. The railroads were required to acquire 69 such locomotives because of the Houston movement and 8 because of the Arizona movement. The total new investment in the case of the Houston movement exceeded $69 million. In the case of the Arizona movement, total new investment exceeded $12 million.

[6]In 1976 (the most current year for which data were then available), BN's rate of return on equity was 4.2 percent, Santa Fe's was 4.2 percent, and SP's was 5.3 percent—returns which were obviously inadequate at a time when *debt* rates were in the range of 8 percent and equity returns were far higher. (HL&P, which is a franchised electric utility and a far less risky investment than the railroads, in 1976 earned a return of 14.7 percent on its equity after provision for income taxes.)

The first group of issues addressed by the Court of Appeals related to whether the proposed rates qualified for capital incentive rate treatment. This was the question to which Petitioners had devoted approximately two-thirds of their briefs before the Court of Appeals; and it occupies a major part of the Court of Appeals' decision (Part II, App. pp. 8a–20a). The Court of Appeals concluded that the proposed rates did qualify for capital incentive treatment.

The petition for certiorari filed by Petitioners does *not* seek review by this Court of the decision below that the railroads' rates qualified for capital incentive treatment.

The second group of issues addressed by the Court of Appeals related to whether the proposed rates were within the zone of reasonableness (App. pp. 26a–34a). The Court of Appeals concluded that the Commission's determinations "reflect full consideration of the evidence and the salient factors" (p. 26a)—including comparable rates (p. 26a), cost evidence (p. 27a), the railroads' need to attract equity capital (p. 28a), and public interest considerations (p. 33a). It then concluded that, "In our view, the Commission has given due consideration in these cases to the relevant factors entering into a determination of reasonableness" (p. 36a).

ARGUMENT

Petitioners assert that the cases as to which review is sought "are the tip of a mushrooming iceberg." (Petition, p. 9). However, their argument is as unsound as their metaphor.

These cases do not present a situation where the decision below is "in conflict with the decision of another court of appeals on the same matter" (Rule 19 of the Rules of the Supreme Court of the United States). There has been no other decision of a court of appeals passing on the validity of a Commission decision approving proposed capital incentive rates.

Nor do Petitioners identify any "important question of federal law" which should be decided by this Court, or which has been decided by the Court of Appeals below in a manner contrary to decisions of this Court.

Petitioners argue that the pricing of coal transportation "is too important to the national interest to go by default." (Petition, p. 9). However, the lawfulness of the two rates involved here is *not* a matter which has gone "by default." The Commission carefully considered Petitioners' arguments that the involved rates were excessive; and the Court of Appeals unanimously affirmed the Commission's orders in a decision which is both careful and comprehensive.

Petitioners also assert that the Commission's orders have "heralded a new era of railroad rate regulation which is totally without metes, bounds, or recognizable principles" (Petition, pp. 9–10). This assertion is not correct. The Commission in these cases did *not* adopt any particular formula approach to determining what is a maximum reasonable rate. It was unnecessary in these cases to determine the maximum level of reasonableness because the involved rates were well below the maximum end of the zone of reasonableness.[7]

In other recent coal rate proceedings (decided long after the decision in the present cases), the Commission has adopted a formula approach in determining the level of maximum

[7]Traffic generally must bear rates which on the *average* cover fully allocated costs, including cost of both equity and debt capital, in order for railroads to attain the standard of revenue adequacy established by Congress in the new Rule of Ratemaking for railroads (49 U.S.C. § 10704(a)). The Houston rate of $15.60 was found to be less than 100 percent of fully allocated costs, including cost of capital reflecting cost of equity as well as cost of debt capital ($16.07; App. p. 24d). The rate-to-variable cost ratio of the Houston rate (using variable costs as determined by the Commission using embedded debt rates) was 163 percent (App. p. 22d); the Arizona rate-to-variable cost ratio was even less, 159 percent (App. p. 17c).

reasonableness. In these cases, the Commission has held that the level of maximum reasonableness may be found by multiplying fully allocated costs of service by a factor of 1.07. Both shippers and railroads have filed petitions for review of these decisions in several courts of appeals (among those listed in Appendix H). However, the Commission did *not* apply any such formula approach in the Houston or Arizona cases. Petitioner's references to the Commission's decisions in these other cases as "unreasoned" or "fluctuating", or even as lacking "rhyme or reason" (Petition, p. 10), have no bearing on the present cases and thus do not constitute reasons to grant the petition for certiorari in this case.[8]

Similarly, Petitioner's reference to the Congressional testimony of a representative of the United States Department of Energy with respect to the impact of coal rates on national energy policy (Petitions, p. 11) is not a reason to grant the petition in this case.[9]

[8]Petitioners' statement that the issues in these other coal rate cases are "identical to the cases here" (Petition, p. 11) is wrong. The validity of the Commission's "107 percent solution"—applied on an interim basis in certain coal rate cases decided since May 1979—is not at issue in the instant cases. (Indeed, the Houston rate was found to be less than 100 percent of fully allocated costs. See *supra* p. 6, fn.7)

[9]Congressman Eckhardt's brief as amicus curiae argues that the rates approved by the Commission threaten national coal conversion policy (Brief, p. 20 et seq.). This argument was *not* made to the Commission in these cases by any party. However, it has been made in other coal rate proceedings before the Commission; and in these other cases the railroads have shown that the rates they propose will not have an adverse effect on national energy policy.

Petitioner's statement that the "I.C.C. itself has verified" that escalating coal rates cause coal usage to shrink (Petition, p. 11)—citing a *draft* Environmental Impact Statement prepared by the Commission's Energy and Environmental Branch which is a *party* to the proceeding before the Commission in which the draft was prepared (a proceeding which is continuing and in which the Commission has announced *no* decision)—is not only inapplicable to these movements, but is also a serious misstatement.

Petitioner contends that the Commission erred in giving too much weight to the revenue needs of the railroads (Petition, p. 12). However, the Commission did not give exclusive weight to railroad revenue needs, it considered other factors—including rate comparisons (p. 26a), cost evidence (p.27a), and public interest considerations (p. 33a). Moreover, it would have been clear error for the Commission, *not* to have given weight to railroad revenue needs. The new Rule of Ratemaking for railroads enacted as part of the 4-R Act in 1976 *directed* the Commission to "make an adequate and continuing effort to assist" the railroads attain revenue adequacy. "Adequate" revenue levels were defined by Congress to be revenues adequate to cover operating expenses "plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business," including a return level that would "permit the raising of needed equity capital." The principal purpose of this new Rule of Ratemaking was to allow the railroads greater flexibility in setting and modifying rates, so that they could attract capital in the private capital markets and thus rehabilitate their physical facilities and provide needed service to the public.[10] In light of this statutory mandate, the Commission

[10]Section 101 of the 4-R Act states that the purpose of the 4-R Act was "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway systems, so that this mode of transportation will remain viable in the private sector of the economy . . . ." (Section 101(a), 45 U.S.C. § 801(a)).

The legislative history of the 4-R Act fully confirms Congress' concern with restoring the railroads to financial health. The House Committee on Interstate and Foreign Commerce, which reported favorably on the bill that became the 4-R Act, stated (Report on H.R. 10979, H.R. Rep. No. 94-725, 94th Cong., 1st Sess. at 54 (1975)):

> "Every study that has been done, indicates that within the next eight to ten years, the railroads are going to experience new cash shortfalls. Estimates of the shortfalls range from the ICC's low of \$3.6 billion, to a high of \$21.1 billion, which is the First National City Bank's estimate. With these projections, it is obvious that the

(footnote continued on following page)

could not lawfully disregard the revenue needs of the railroads in determining maximum reasonable rate levels.[11]

Finally, Petitioners argue that if its petition is denied, they will get no "second chance" (p. 16). However, to allow Petitioners the "second chance" they seek would violate the terms and purposes of Section 10729. The capital incentive rate provisions of the Act (Section 10729) provide that if a proposed capital incentive rate is not found by the Commission to be unlawful within 180 days of the date it is filed, "such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside

(footnote continued from preceding page)

> railroads are not going to be able to repair their tracks. The marginal railroads are going to go under because they cannot offer competitive services. The lack of available funds will only result in more deferred maintenance, more disinvestment in the railroad industry, and eventually more bankruptcies."

[11]Congressman Eckhardt suggests that although the new Rule of Ratemaking contained in the 4-R Act had become effective on February 5, 1976, the Commission was somehow *precluded* from even considering railroad revenue needs until the completion of the Commission's rulemaking proceeding instituted to promulgate standards and procedures for establishing adequate railroad revenue levels (Brief, pp. 10–13). The Commission issued its report in that proceeding in early 1978. *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels,* Ex Parte No. 338 (decided January 31, 1978, served February 3, 1978). However *nothing* in Section 205 of the 4-R Act (now Section 10704(a)(2)) states, or even suggests, that the Commission was forbidden to consider railroad revenue needs prior to the time the rulemaking was concluded.

Indeed, quite the reverse is true. Congress directed the Commission to make "an adequate and continuing effort" to assist the railroads in attaining revenue adequacy. Under Congressman Eckhardt's construction of the Act, Congress passed a bill to prevent any further collapse of the nation's railroad system—but required the Commission to allow the collapse to continue for 24 more months while it completed a rulemaking proceeding to define "revenue adequacy"—a construction belied by both the plain terms and clear purpose of the 4-R Act. (Indeed, by Congressman Eckhardt's theory, there was no statutory Rule of Ratemaking for railroads for two years.) No such argument was even suggested to the Court of Appeals below.

as unlawful under section 1, 2, 3, or 4 of this title . . . ." The purpose of this provision was to encourage major railroad investment by eliminating the delays and uncertainties associated with litigation before the Commission and in judicial review proceedings.[12] In both of these cases, the 180-day periods expired in November 1977. The railroads have made the capital investments contemplated by the Act in reliance on the Commission's approval of their rates. Moreover, Petitioners have now abandoned any argument that those rates are not proper capital incentive rates (see *supra,* p. 5). Thus, no question at all—let alone any serious question—is presented as to the protected character of these rates under the capital incentive provisions of the Act.[13] Accordingly, Petitioners are not entitled to a "second chance" to attack the rates applicable to their coal movements.

CONCLUSION

The railroads have invested hundreds of millions of dollars in order to handle huge new volumes of Western coal, and tens of millions to handle the Houston and Arizona movements at issue here. To raise this needed capital in the private financial markets, the railroads must dramatically improve their rates of return. The Commission in these cases approved rates which approximately cover the fully-allocated costs of service, including cost of capital (equity as well as debt). Its decisions were clearly not arbitrary or

[12]*See* Report of the Senate Committee on Commerce on S.2718 (Report No. 94-499), 94th Cong., 1st Sess. (1975), pp. 11-12.

[13]Petitioners' suggestion that this Court should defer action on their petition until such future time as some other coal rate case is "taken up by the Court" (Petition, p. 17) assumes without basis that some future case will be "taken up." Moreover, the other rate cases are different—involving different parties, different records, and in some instances different analysis (see *supra,* pp. 6-7). Putting aside Petitioners' assumption that all coal rate cases present the same "inextricably related economic, political, and even military" issues (Petition, p. 17), there is no basis whatever for Petitioners' speculation that the *legal* issues presented in such future cases will be the same as those resolved in these cases by the Court of Appeals below.

irrational. The Court of Appeals was clearly correct in affirming the Commission's orders. Disapproval of these rates would have been inconsistent with the statutory requirement that the railroads be permitted to charge rates which cover their costs plus a fair return that will "permit the raising of needed equity capital" and assure the existence of "a sound transportation system in the United States."

For the foregoing reasons, the requests by Houston and Arizona for issuance of a writ of certiorari should be denied.

Respectfully submitted,

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FORT WORTH AND DENVER RAILWAY COMPANY,
THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY,
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OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
BURLINGTON NORTHERN, INC.,
THE COLORADO AND SOUTHERN RAILWAY COMPANY,
FORT WORTH AND DENVER RAILWAY COMPANY,
THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Respondents

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

I

INTRODUCTION

The arguments of the Federal and the railroad Respondents seek to cloak these cases in wraps of

ordinariness, thereby dissuading the Court from assuming jurisdiction. As told by the Federal Respondents, these cases present routine examples of "traditional evaluation" (Brief of the Federal Respondents, p. 7) by the Interstate Commerce Commission and as such present no important questions.

These proceedings emphatically do not involve the "factors traditionally considered in determining the reasonableness of rail rates" (Brief of the Federal Respondents, p. 5), but instead present the Commission's first attempts to implement the new rate regulatory regime enacted in the *Railroad Revitalization And Regulatory Reform Act Of 1976 ("4-R Act")*, Pub.L.No. 94-210, 90 Stat. 33. Elsewhere, in a proceeding where the issues are identical, the Department of Justice described them to a lower court as "difficult and important legal issues which impact on the policies of several federal agencies."[1] The Federal Respondents do raise one new argument, however, which requires this reply.

II

THE NEW INTERIM APPROACH ARGUMENT

In its opinion the court below was under the misapprehension that in these cases it was reviewing a temporary approach to ratemaking in force pending the completion of a more fully considered rulemaking case (Pet. App. 33a).[2] The Federal Respondents con-

[1] Joint Motion for Enlargement of Time to File Respondents' Brief at 2 (Dated July 24, 1979), *Celanese Chemical Co.* v. *I.C.C.*, No. 78-3651 (5th Cir., filed Dec. 4, 1978).

[2] That case was *Ex Parte 338, Standards and Procedures For The Establishment of Adequate Revenue Levels* (Decision Served Feb. 3, 1978) (unprinted) *as modified*, 359 I.C.C. 270 (1978).

tinue to represent that the approach is interim, but now suggest that the standards and guidelines will be forthcoming in an entirely different case.[3]

This newly-devised position is, of course, necessitated by the agency's total failure to quiet down the furor over its coal ratemaking orders in the proceeding in which Judge Leventhal was led to believe that these issues would be carefully considered. While the Federal Respondents are continuing to pray for deferential judicial scrutiny of the I.C.C.'s orders on the ground that "more precise standards and guidelines" are in the offing (Brief of the Federal Respondents, p. 8 n. 4), this position completely disregards the fact that these rates are immutable for the petitioners unless the Court acts,[4] and the forthcoming future and "comprehensive" standards will be of little solace to petitioners.

III

CONCLUSION

The attempts of Respondents both to downplay the important issues in these cases, while at the same time arguing that they are sufficiently consequential to be the subject of major rulemaking cases wherein they will be resolved, must not succeed. Absent action by this Court, millions of Texas and Arizona electric customers will pay exorbitant freight rates whose levels are immune to the modification which ultimately

[3] *Ex Parte 347, Western Coal Investigation—Guidelines For Railroad Rate Structure.*

[4] Under the statutory provision governing capital incentive rates, such rates cannot be set aside by the Commission for a period of five years after becoming effective. 49 U.S.C. § 10729; Joint Petition, p. 16.

must come from the various rulemaking cases stressed by the Federal Respondents.

Respectfully submitted,

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Dated: February 8, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY
and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE FOR AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE

In accordance with this Court's Rule 42, the American Public Power Association, Edison Electric Institute, and the National Rural Electric Cooperative Association ("Amici") have received the written consent of counsel for all parties to file this brief as amici curiae. Copies of the consents have been filed with the Clerk.

Amici submit this brief in support of the Joint Petition For Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Houston Lighting and Power Company ("Houston") and Arizona Electric Power Cooperative, Inc. ("Arizona") on November 20, 1979.

Identity and Interest of Amici

The American Public Power Association is a national service organization representing more than 1400 local, municipally owned electric utilities in 48 states, Puerto Rico, the Virgin Islands, American Samoa and Guam. Local publicly owned utilities serve approximately 14% of all U.S. consumers.

Edison Electric Institute is the association of the Nation's investor-owned electric utilities. Its members serve 99.6% of the customers serviced by the investor-owned segment of the industry. They generate more than 77% of all the electricity in the country and serve more than 77% of all ultimate customers of electricity.

The National Rural Electric Cooperative Association is a national service organization whose membership consists of roughly 1,000 rural electric cooperatives. These member systems supply electricity to over 25 million people in 46 states.

Coal now serves as a primary boiler fuel for electric generating facilities providing approximately 45% of the electric power generated in this country.[1] For most of these facilities, the railroads offer the only feasible means of transporting coal from the mine to the point of consumption at the utility plant. This is true whenever a generating station is served by a single railroad or a mine on which the utility is dependent for coal, usually under a long-term contract, is served by a single railroad. Thus, these utility coal shippers are "captive" to the railroads for the coal transportation services which they require. In many cases, as illustrated by the factual circumstances of the Houston and Arizona movements directly involved in this proceeding, this captivity is not only to the rail mode

[1] *Monthly Energy Review*, United States Department of Energy Information Administration—0035/7(79), July, 1979, at 62.

in general, but to particular railroads that possess monopolies over rail traffic moving from the particular mine to the individual utility plant. Under these circumstances, which prevail for a large percentage of coal-fired utility plants, the railroads possess extremely broad monopoly pricing power which can only be moderated through the maximum rate regulation authority granted to the Interstate Commerce Commission ("Commission" or "ICC") under the revised Interstate Commerce Act.[2] For this reason, amici and their members are directly and vitally concerned with the issues raised by the Houston and Arizona petition for a writ of certiorari. This interest is heightened by the fact that in response to the Nation's need to reduce dependence on foreign energy sources and in compliance with federal programs[3] the percentage of electric power generated from coal by amici's members will be increasing dramatically in coming years. Inevitably, the great majority of this coal will also move by railroad.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED BY THIS CASE WARRANT THIS COURT'S REVIEW.

This case presents at least two important legal questions. Those questions are:

A. Whether the Court of Appeals erred in interpreting 49 U.S.C. §10729, the "capital incentive rate" provision of the revised Interstate Commerce Act; and

[2] 49 U.S.C. §10101 *et seq.*

[3] *See, e.g.*, the *Powerplant and Industrial Fuel Use Act*, Pub. L. No. 95-620, 92 Stat. 3289 (1978); the *Public Utility Regulatory*

(*footnote continues*)

B. Whether the Court of Appeals erred in failing to require the Interstate Commerce Commission to articulate the rationale for its views in the decision below, in derogation of the public interest.

A.

The Court of Appeals indicated that the cases below required the first judicial interpretation of the "capital incentive rate" provision of the revised Interstate Commerce Act ("Act"), 49 U.S.C. §10101 *et seq.* Pet. App. at 3a. Section 10729 provides expedited consideration of rates filed pursuant to it and insulates any such rates, once approved, from being reduced for five years. *Id.* Section 10729 may be triggered by the mere conventional, ordinary-course-of-business purchase of two locomotives, if the Commission's and the Court of Appeals' interpretation of that section is accepted. *Id.* at 16a, 4c, 5d. It is, therefore, self-evident that §10729 provides an attractive vehicle for raising rates on "captive" coal traffic unless this Court restricts the breathtaking scope ascribed to §10729 by the Commission and the court below. *See* Pet. App. at 8a-20a.

B.

Apparently, the Court of Appeals thought that only "an abdication from reason" could provide grounds for setting aside the determination of the Commission as to the lawfulness of the proposed capital incentive rates. *Id.* Nevertheless, the Court of Appeals did acknowledge that "under traditional principles, a carrier's revenue needs

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(*footnote continued*)

Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978); and the *National Energy Conservation Policy Act*, Pub. L. No. 95-619, 92 Stat. 3206 (1978).

had no relevance to the determination of the reasonableness of any individual rate" *citing Scott County Milling Co.*, 194 I.C.C. 763, 785 (1933) and *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592 (1949). Pet. App. at 31a and n. 51. Whatever the merits of the lower court's opinion for ratemaking in general, the Court of Appeals erred in deferring to the Commission to such an extent in the situation presented by these cases. Congress clearly intended that rulemaking on revenue adequacy precede individual rate decisions, *see* "Brief Amicus Curiae" of Congressman Eckhardt at 10-17, and the Commission should not have prejudged the outcome of its pending revenue adequacy proceeding as it did here. The Commission compounded its error by failing to make findings on the revenue adequacy of the railroads involved and the extent (if any) to which such presumed need could justify higher rates. The Court in such a case must vacate and remand for proper consideration of the matter so that meaningful court review is available. *See* Petition at 12-13.

The issues in this case are important to shippers and carriers, and most of all, to all consumers of electricity. Resolution of these issues by this Court is necessary to serve as a guide to the vast array of other pending litigation raising similar questions. *See* Appendices G and H to the Appendix.

II.

THE ISSUES INVOLVED ARE OF BROAD NATIONAL SCOPE.

The Houston and Arizona petition for a writ of certiorari raises fundamental issues concerning the exercise by the Interstate Commerce Commission of its rail rate regulation authority under the Interstate Commerce

Act as amended by the Railroad Revitalization and Regulatory Reform Act of 1976. Pub. L. No. 94-210, 90 Stat. 33 ("4-R Act").

In its decisions rendered in the Houston[4] and Arizona[5] cases, the Commission found that the 4-R Act established new ratemaking standards to be applied in evaluating the maximum lawful level for rates on individual movements of rail traffic. Pet. App. at 17c, 24d. However, the Commission has failed to articulate either in the Houston or Arizona cases, or in its subsequent coal rate decisions, a rational method of applying these new ratemaking criteria. The resulting confusion concerning the governing principles of ICC maximum rate regulation has occasioned not only the flurry of coal rate litigation before the Commission and the federal courts described in the petition for certiorari, but also a tremendous uncertainty, with respect to contemplated new coal movements, as to the rate levels which might ultimately be permitted on such movements by the ICC.

The delivered cost of the coal fuel has a major influence upon the economic feasibility of new coal-fired power generating facilities. The price of rail transportation is, in turn, a major element of the delivered price of the coal—frequently far exceeding the mine-mouth price of the coal itself. As the Department of Energy has correctly noted, the prevailing uncertainty over coal transportation pricing thus has a chilling effect

[4] *Incentive Rate on Coal—Cordero, Wyoming To Smithers Lake, Texas*, 358 I.C.C. 537 (1977), set out as Appendix D to the petition for certiorari.

[5] *Incentive Rate on Coal—Gallup, New Mexico To Cochise, Arizona*, 357 I.C.C. 683 (1977), set out as Appendix C to the petition for certiorati.

upon conversions to coal fuels.[6] At this time in our Nation's history, when coal must play such a major role in our campaign for energy sufficiency, this situation cannot be permitted to continue. The need for rational and consistent rail ratemaking policies and guidelines must be addressed and the Houston and Arizona cases provide the Court with an appropriate vehicle to consider these issues in a timely fashion. The importance of the issues far transcends the interests of the two individual utilities involved, impacting nationwide upon a major segment of the electric utility industry.

III.

THE FINANCIAL CONSEQUENCES OF THE ISSUES RAISED ARE OF MAJOR DIMENSIONS AND WILL BE DIRECTLY SHOULDERED BY THE NATION'S ELECTRIC UTILITY RATEPAYERS.

In a very real sense, amici appear before this Court more in the role of spokesmen for the ratepayers of their member companies than for the members themselves. In many parts of the country, increases in the cost of fuel, which ordinarily includes the cost of transportation required to deliver the fuel, are passed by utilities directly through to the consuming public, subject to regulatory scrutiny, by mechanisms which can be generally described as fuel cost adjustment pass-throughs. By operation of fuel cost adjustment pass-throughs, the burden of increases in coal freight rates is felt immediately and with full force by the consumer. Amici and their constituent members have been and will continue to be vigilant to protect their ratepayers from unjustified increases in the

[6] Statement of Fact and Argument of United States Department of Energy, dated August 4, 1978, in *Ex Parte 347, Western Coal Investigation—Guidelines for Railroad Rate Structure*, at 18-28.

cost of fuels and, in this case, in the cost of transporting the coal required for coal-fired power generating facilities.

The amount of money at issue in coal rate disputes which have been litigated before the Commission can be appreciated by reference to the Houston experience. In the Houston case here before the Court, the utility maintained that traditional ratemaking criteria and due consideration of the 4-R Act goals warranted establishment by the Commission of a rate no higher than $11.00 per ton, while the railroads requested and the ICC approved a rate of $15.60 per ton. Since the Houston facility requires approximately 5 million tons of coal per year, the resulting differential amounts to more than $23 million *per year* for this one movement! Moreover, since this rate in effect constitutes a base rate which is then periodically increased, this differential has a continuing effect. Thus, over the thirty year life of the involved Houston facility, the ultimate impact could greatly exceed $690 mllion on this movement alone.

The Houston case has, of course, been followed by numerous other rate disputes before the Commisson that have also involved huge sums.[7] It is clearly no exaggeration to state that billions of dollars are at stake for coal traffic alone in the resolution of the issues relating to the proper standards to be applied by the Commission in maximum rate regulation. Electric utilities and their ratepayers already face staggering financial demands for

[7] *See, e.g., Docket No. 36180, San Antonio, Texas v. Burlington Northern, Inc.*, Decisions served October 25, 1978 and June 1, 1979 (unprinted) involving rate increases of roughly $15 million per year and *Docket No. 36970, Annual Volume Rates On Coal—Wyoming To Flint Creek, Arkansas* and *Docket No. 36980, Southwestern Electric Power Co. v. Burlington Northern, Inc.*, combined Decision served May 25, 1979 (unprinted) involving increases of approximately $4.5 millicn per year.

the capital outlays which will be required to construct new coal-fired facilities. They must not be saddled with the tremendous additional costs which unjustly high railroad freight rates for coal transportation will occasion.

CONCLUSION

The importance of the issues raised by the Houston and Arizona petition and the magnitude of the financial consequences entailed in the resolution of these issues warrant the issuance by this Court of a writ of certiorari.

Respectfully submitted,

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December, 1979

IN THE
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NO. 79-793

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HOUSTON LIGHTING AND POWER COMPANY,
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V.

INTERSTATE COMMERCE COMMISSION, et al.,
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* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HOUSTON LIGHTING AND POWER COMPANY,
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* * *

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * *

Mark White, Attorney General of Texas, respectfully files this brief as *amicus curiae* in support of the Joint Petition of Houston Lighting and Power Company ("HLP") and Arizona Electric Power Cooperative, Inc. ("AEPC") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

I. INTEREST OF THE STATE OF TEXAS

For the past fifty years, the economy of the State of Texas has been heavily dependent upon the once cheap and abundant petroleum and natural gas readily available within its borders. However, in recent years Texas and the nation have become increasingly reliant on imported oil. The OPEC oil embargo in 1973, and the continuing energy crisis that followed it, made it clear that our nation's increasing reliance on imported oil cannot continue much longer. Congress has reacted to these new energy realities with a series of laws[1] confirming and promoting the national policy of promoting the maximum possible use of our relatively plentiful domestic fuels, such as coal, in preference to scarce and costly fuels such as imported petroleum and natural gas.

Because of Texas' long reliance on its own natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, a shift to increased coal use will be far more difficult and costly for Texas than for some other areas of the country. Nevertheless, Texas has fully supported the Congressional coal conversion programs and the national energy policy which they seek to implement. The Fuel Use Act, passed in 1978, is a key element in those programs. It generally prohibits

[1]*See*, e.g., the *Emergency Petroleum Allocation Act of 1973* (Pub. L. 93-511, 88 Stat. 1608); the *Federal Nonnuclear Energy Research and Development Act of 1974* (Pub. L. 93-477, 88 Stat. 1978); the *Energy Reorganization Act of 1974* (Pub. L. 94-438, 88 Stat. 1233); the *Energy Supply and Environmental Coordination Act of 1974* (Pub. L. 93-319, 88 Stat. 246); the *Energy Policy and Conservation Act* (Pub. L. 94-163, 89 Stat. 871); the *Energy Conservation and Production Act* (Pub. L. 94-385, 90 Stat. 1125); and *the Powerplant and Industrial Fuel Use Act* (Pub. L. 95-620, 92 Stat. 246) ("Fuel Use Act").

utilities and industries from using natural gas as a boiler fuel in new facilities. On December 17, 1975, the Railroad Commission of Texas promulgated an order known as "Gas Utilities Docket 600 -- in Re: Elimination of Natural Gas As a Boiler Fuel In Texas" ("Docket 600") which contained requirements analogous to the Fuel Use Act.[2] Docket 600 was in several respects more stringent than the Fuel Use Act.[3]

Texas' utilities and industries, including HLP, have undertaken to support and comply with these national programs by conversion to the use of coal. One would have expected Congress and the federal agencies to be united in their support of those coal conversion efforts. Instead the Interstate Commerce Commission (the "Commission"), has effectively penalized those efforts. In particular, the Commission's western coal transportation rate decisions such as those at issue here have approved extortionate freight rates on the transportation of coal from the upper midwest to Texas, on the ground that such traffic is a ready source of additional funds thought to be needed by the railroad industry. The circumstances which make Texas coal users a ready source of such funds are the OPEC price increases and governmental actions such as the Fuel Use Act, which together have largely eliminated inter-fuel competition as an effective constraint on coal transportation pricing.[4] Since the railroad industry has

[2]Subsequent to the passage of the Fuel Use Act in 1978 Docket 600 was repealed.

[3]For example, although the Fuel Use Act bans use of natural gas to fuel new generating units (§201), it provides exemptions from the prohibition (§§211-14) beyond any available under Docket 600.

[4]This is particularly true once a utility has signed a long-term coal purchase contract and has invested millions of dollars in coal-burning facilities. At that point it has no choice but to pay whatever it costs to transport the coal it is already committed to buy. Such a utility will think twice, however, before making investments

a monopoly over coal transportation in the West,[5] these circumstances mean that the railroad industry can now raise its rates on Western coal traffic to almost any level it pleases, thereby increasing its profits, without fear of causing existing traffic to stop moving. The Commission has in effect said that the railroad industry should be *permitted* to charge more on western coal traffic because it *can* charge more.

The very purpose of regulating the prices of monopolies such as railroads and public utilities, of course, is to prevent them from exercising their economic muscle to charge unreasonably high prices. In effect, the Commission has gone full circle on coal rates. Abandoning its role as guardian of the public interest, it now *encourages* the monopolistic pricing practices of the railroads it was created to control.

The Commission has virtually abdicated its regulatory responsibilities in the area of western coal rates. This has meant that the nation's energy policies have increased the economic leverage of the railroad industry. Thus, those policies have perversely resulted in extortionate coal freight rates being passed on to Texas citizens. We cannot allow this to continue.

Texas and its people and industries have undertaken

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requiring *additional* coal purchases, once it has been victimized by the railroads' rate-gouging. Other prospective coal receivers, not yet burned, will also be reluctant to convert. This is perhaps the most ominous of the adverse energy impacts flowing from ICC decisions which allow the railroads to exploit their monopoly power for short-run profits.

[5]Motor transport of coal is economically and environmentally impractical over long distances, and barge transport is not an alternative unless both mine and power plant are near navigable waterways. Moreover, virtually every coal mine in the West, and most power plants, are served by only one railroad, and thus there is not even any potential for competition *between* railroads.

to do their share toward the resolution of the nation's energy problems. They have recognized from the beginning that conversion of Texas utilities and industries to coal, in order to free petroleum and natural gas reserves for higher and better uses elsewhere, will entail substantial capital costs that will have to be borne by Texans. However, if those costs are to be compounded by the decisions of a federal agency bent on enriching the railroads, the inevitable economic consequence is that the use of domestic coal will be seriously hampered. If this happens the nation will be the loser.

II. REASONS FOR GRANTING THE WRIT

The substantive issue before this Court is whether the Commission erred in determining in the HLP and AEPC decisions (the "HLP Order" and the "AEPC Order", respectively) that coal transportation rates approved in those Orders are reasonable. This brief will focus on two generic complaints against the Commission's Orders:

1) that the Commission did not apply the correct legal principles in making its determinations; and

2) that the Commission's findings lack sufficient specificity.

Many issues have been raised by HLP and AEPC in regard to, among other things, the Commission's calculation of the costs involved in the instant movements. These claims are significant and merit this Court's close attention. However, the State of Texas will not in this brief address those detailed issues but rather will concentrate its discussion on an invidious practice in which the Commission has engaged in this case. That practice is the allowance and indeed support of an abuse by the railroads of their monopoly position in regard to the transportation of western coal. That transportation

monopoly is reinforced by the lack of viable options to the use of that energy source by HLP and AEPC and others similarly situated. That abuse consists of the requirement that the shippers of western coal subsidize the railroads' less profitable movements.

The State of Texas contends that the rates at issue are too high. The introductory portions of the brief have indicated the impact which coal transportation rates have on the national energy policy and on Texas specifically. It is not the position of the State of Texas that the railroads should not be allowed to operate the instant movements at a reasonable profit. That profit and the rate from which it is derived, however, must be no higher than a reasonable level.

A. SUBSIDIZATION OF COMPETITIVE ROUTES

The rate prescribed substantially exceeds the cost of transporting coal in the instant movements. There is little dispute in the record about that, although there is some dispute about the precise numbers. Even the Commission calculates that its rate in the HLP Order is "163% of variable costs and 121% of fully allocated costs."

There is, likewise, little dispute as to what this means. It means that HLP and AEPC and their consumers are being forced to subsidize the railroads on shipments of other commodities over which the railroads do not have a transportation monopoly.

At page 14 of the HLP Order the Commission summarizes one of the railroad's contentions in support of the rate as follows:

> Moreover respondents point out that much railroad traffic must move at rates below fully allocated cost because of competition. Therefore, if a railroad is to earn an overall return which covers its full costs, it must be allowed to set many rates well in excess of their full-cost level where competition, market conditions, and demand permit. For example, respondents point out that because wheat constitutes such a large portion of the Santa Fe's traffic and because rates on wheat are depressed and moving at little over variable cost because of truck competition, coal must contribute relatively more toward system-wide needs.

The rate granted constitutes and is intended to constitute such a subsidy paid by these shippers to support other less profitable movements.

The decision of the Commission to require such a subsidy is based on its construction of Section 205[6] of the *Railroad Revitalization and Regulatory Reform Act of 1976*, Pub. L. 94-210, 90 Stat. 31 (1976) (the "4 R Act"). In a rate case involving these railroads and a Texas utility but not dealing directly with the subsidy issue as currently presented, the Eighth Circuit declared that rates for rail services should be "structured to 'stand on their own wheels.' " *Burlington Northern, Inc. v. U.S.*, 555 F.2d 637, 647 (8th Cir. 1977). The Court specifically explained that rates for services should "stand on their own wheels" in the sense that consumers in one community should not be forced to subsidize consumers in another community, and consumers of one product should not be forced to subsidize consumers of another product. The Commission itself has held that "lack of adequate revenues from operations as a whole affords no reliable measure of the reasonableness of rates...on individual commodities," *Scott County Milling Co.*, 194

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[6]Section 205 constituted an amendment to Section 15a(4) of the Interstate Commerce Act which is now codified as 49 U.S.C. 10704(a)(2).

I.C.C. 763, 765 (1933).[7] This position is reasonable, logical, and is in accord with the duty of the Commission to guard against abuse of monopoly power.

The Commission apparently feels that Section 10704(a)(2) alters that rule of law. It does not.[8] The intent of that statutory provision and the national policy of "Railroad Revitalization" evidenced by the 4 R Act is fully served if the rates at issue are set at a level which allows these railroads, when operated in an "honest, economical and efficient"[9] manner, to pay the costs properly attributable to the movement at issue and to receive a reasonable return to capital or profit on that movement.

The rates at issue were designed to exceed that level substantially. They were designed to constitute and do constitute subsidies to the railroads for traffic which allegedly moves at a lower level.

Even if the 4 R Act had been drafted so as to allow for the imposition of such a subsidy burden, it would be improper to impose that burden here. It is an elemental tenet of transportation law that the public interest must be a primary factor in the Commission's decisions on rate matters. In the words of this Court: "Rate structures are not designed merely to favor the revenues

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[7]This reference is cited by the Court of Appeals at page 31 of its opinion below. The court also cites *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592 (1949).

[8]The so-called "rule of ratemaking" which is the source of that rule of law is now codified as 49 U.S.C. 10701(a). It provides that "a rate (on a regulated service)...must be reasonable". Section 10704(a)(2), upon which reliance has been placed in regard to consideration of the revenue needs of the Railroads and to the imposition of such subsidy burdens does not amend that basic statutory provision.

[9]49 U.S.C. 10704(a)(2).

of producers and carriers. The Commission has the consumer interest to safeguard as well." *Ayrshire Collieries Corp. v. United States*, supra. The Commission has gone so far as to hold that the "public interest is the *first* consideration in determining the reasonableness of rates" (emphasis added). *Hansen Packing Co. v. Baltimore & Ohio Ry.*, ICC 75, 77 (1934).

It is difficult to conceive of an issue of greater public interest than the Nation's energy problems. Those problems, as discussed above, have been the focus of repeated congressional and administration concern and action throughout the 1970's. The Commission's decision reflects a complete disregard of those problems. There can be no question but that high freight rates will discourage increases in coal usage. The Commission itself recently so found:

> As rates vary, coal usage varies inversely...The changes in the consumption (real demand) for coal affect the demand for other fuels. (Significantly, the fuel that benefits from the major shifts in coal is residual oil; oil imports are projected...to offset the coal supply shortfalls induced by high coal freight rates.)"

Draft Environmental Impact Statement served October 19, 1979, *Ex Parte 347, Western Coal Investigation -- Guidelines for Railroad Rate Structure*, at Pate XIII.

Thus the approval of a rate which imposes such a subsidy obligation in these cases constitutes a blatant disregard of the public interest in conversion to the use of coal. Such a rate is not "reasonable" within the meaning of the Rule of Ratemaking (49 U.S.C. 10701(a)) and cannot be justified by reference to Section 10704(a)(2). Again, the State of Texas is not seeking a subsidy from other shippers for the movement of coal to Houston. It is, however, adamantly opposed to paying a subsidy.

B. ADEQUACY OF FINDINGS

The Commission concluded that a subsidy burden should be imposed upon both HLP and AEPC. The necessary consequence of this conclusion is that the national energy policy in regard to conversion to coal will be undermined. However, the Commission does not address this issue in its opinion. Neither does it address other issues relevant to the subsidy issue and thus relevant to the more general issue of the reasonableness of the rates.

Any challenge such as this to a Commission rate adjudication must recognize that the courts apply a deferential standard of review. As Mr. Justice Frankfurter observed nearly forty years ago, Congress has narrowly confined the scope of judicial participation in the ratemaking process:

> The process of ratemaking is essentially empiric. The stuff of the process is fluid and changing -- the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

Board of Trade of Kansas City v. United States, 314 U.S. 534, 536 (1942).[10]

Nevertheless, the Commission's discretion in determining the reasonableness of rates is not unbounded. Indeed the courts should not hesitate to reverse an agency decision which abuses that discretion

[10]See *A.T. & S.Fe. Ry. v. Wichita Board of Trade*, 421 U.S. 800, 806-807 (1973); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1942).

or fails to follow the mandates of law.

Under section 8(c)(A) of the Administrative Procedure Act (the "APA"), 5 U.S.C. 557(c)(A), the Commission is required to provide in all of its decisions:

> a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

As this Court has stated in interpreting the APA in another case arising under the Interstate Commerce Act:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (Citation omitted)

Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962).

The Commission's orders must contain more than ultimate conclusions. These orders must contain findings which adequately reveal that all of the relevant factors have been considered and that the agency's conclusion is at least rationally related to the evidence. *PEPCO v. United States*, 584 F.2d 1058, 1062 (D.C. Cir. 1978). In summary, there must be a reasoned analysis of all major issues in Commission rate cases. See *Nat'l. Assoc. of Food Chains v. I.C.C.*, 535 F.2d 1308, 1314-15 (D.C. Cir. 1976); *A.T. & S.Fe. Ry. Co. v. I.C.C.*, 588 F.2d 517, 519 (5th Cir. 1977). Otherwise, the discretion inherent in legislatively-delegated power can degenerate into unchecked administrative caprice. "It is not enough for an administrative agency to assert

'expertise' as a defense for all seasons." *ASG Industries Inc. v. United States*, 548 F.2d 147, 154 (6th Cir. 1977).

There is no mention, much less reasoned discussion in the Commission's HL&P Order of the impact which these egregious rates will have on our national energy policy. It cannot be contended that one of the most significant issues facing our nation today is not relevant to these proceedings. Indeed, Congress has *specifically* directed the ICC to address the effect of its decisions on energy policies. Section 382(c) of the Energy Policy and Conservation Act, P.L. 94-163, 89 Stat. 871, requires the Commission to

> include in any major regulatory action . . . a statement of the probable impact of such major regulatory action on the energy efficiency and energy conservation.[11]

The provision of the 4 R Act upon which the Commission relies for its supposed authority to require a subsidy to be paid is, as stated above, 49 U.S.C. 10704(a)(2). However, the Commission failed to include findings as to Section 10704(a)(2)'s operative provisions in the Orders. There is no finding that the revenues of these railroads, or any of them are not "adequate". There is no finding, even if revenues are deemed to be inadequate, that such inadequacy exists despite "honest, economical, and efficient management." There is no finding that the levels of debt, the repayment of which is sought to be assured, are "reasonable". In short, there is no basis stated for the implied conclusion that these railroads have inadequate revenues within the meaning

[11]It can scarcely be contended that the ICC decisions at issue here were not "major regulatory actions", in light of the millions of dollars that turned on them, and in light of their enormous impact on the nation's energy policies.

of that statute.[12]

The Commission offers two "proxy tests" at page 35 of the HLP Order which purport to show the impact of the revenue need factor on its decision. The "proxy tests" (a) are not explained in sufficient detail to allow their evaluation, and (b) are not given any identifiable weight in the decision making process.

The analysis of the Court of Appeals at page 30 of its opinion below points out graphically, although inadvertently, the defect in the Commission's reliance on revenue need in support of its decision to require a subsidy. That Court says:

> While it did not prescribe specific standards by which to determine the adequacy of revenue levels--deeming that effort inappropriate in view of the then-pending rulemaking directed to the question -- the Commission in both cases felt that consideration of overall revenues was nonetheless desirable in light of the strong congressional policy embodied in Section 10704(a)(2). The Commission emphasized the particular importance of this consideration in capital incentive rate proceedings, where the congressional purpose to encourage large-scale investment--with the concomitant need to raise capital--was especially acute. Thus, recovery of revenues in excess of fully allocated costs was justified in these cases. (Footnote Omitted.)

The foregoing embodies a logical fallacy. The existence of such a "congressional policy" does not imply the

[12]Even if such findings were present and supported by evidence the preceding section of this brief demonstrates that the 4 R Act would not allow the imposition of a subsidy requirement on HLP and AEPC, and, in any event, consideration of the National Energy Policy would bar its imposition here.

propriety of imposition of subsidy obligations on any shipper, much less on HLP or AEPC, and this is especially true in light of the complete absence of any findings on the existence of revenue needs; the extent of those needs, if any; or whether those needs, if any, exist despite "honest, economical and efficient management."[13]

At page 32 of its opinion, the Court of Appeals states:

> It is not a fatal flaw that some traffic is carried at rates above total cost; the revenues from such traffic when added to revenues from traffic that competition requires be carried at less than full cost (but with some contribution to fixed costs), yield adequate overall revenues.

This bold assertion is unsupported by any findings in the Commission's Order. Even if imposition of a subsidy obligation is under some circumstances permissible under the 4 R Act the Court is engaging in pure speculation when it makes the foregoing assertion.

This points to another fundamental defect in the Commission's decision-making process and its Orders. Although it is clear that a subsidy is being paid by HLP and AEPC, no one knows the amount of that subsidy or who the beneficiaries are. When such a subsidy is paid the railroad benefits directly but the shipper for whose business the railroad is competing also benefits from reduced shipping costs. Therefore, when the Commission imposes such a subsidy burden on HLP it is, in effect, taking money from HLP and its customers and giving that money not only to the railroads but also to the competitive shipper. However, one cannot

[13]The Court noted that in the AEPC Order, the Commission repeated the Railroads' argument regarding lower rates on competitive service. However, that recitation (a) does not constitute an adequate finding on the relevant issues, and (b) is inapplicable to HL&P.

determine from the HLP order how much subsidy is being paid or who, other than the railroads, is receiving the benefit of that money. If the Commission knows, it should disclose that information in its order; if it does not know then its order is not based on substantial evidence and is arbitrary and capricious.

As stated above, the 4 R Act does require that, in its rate determinations, the Commission "balance the needs of carriers, shippers and the public." Section 101(b)(1). One of those needs is the need to convert to the use of coal as a boiler fuel.[14] The Court of Appeals at page 34 of its opinion below recognizes the Commission's failure to address those issues when it says "while the Commission's decisions do not address the public interest explicitly, they reflect a permissible balancing of the pertinent interests." That Court's conclusion as to the propriety of the Commission's action is unfounded. Without explicit findings and explanation there is no way for a Court to determine whether a "permissible balancing" has occurred. This situation provides an excellent example of the need for careful and detailed consideration and explanation in the Commission's orders.

These rates were filed under the so-called Capital Incentive Rate provision of the 4 R Act (49 U.S.C. 10729). Where certain levels of capital expenditure are involved, it provides that expedited adjudicatory proceedings will apply and protects the resulting rate from reduction for five years, a substantial advantage to the railroads in these cases. The Court of Appeals in its opinion below (at page 26) makes the following statement in regard to judicial review of Commission action in Capital Incentive cases:

[14]The discussion herein of the public interest has concentrated on the national energy policy favoring coal conversion because of its immediate relation to the subject at issue and its pressing national importance, however, other public issues, e.g., inflation and balance of payments problems, will also be affected.

> The congressional interest in encouraging large-scale investments by minimizing regulatory uncertainty, coupled with sensitivity to the time pressure under which the Commission must operate in capital incentive proceedings, suggest that this standard of review be applied with *an extra dollop of deference.* (Emphasis added.)

That assertion is wholly without merit and cannot be allowed to stand unchallenged. If any change in the general standard of review and level of judicial deference is appropriate in cases under that section it is a change toward an increased level of vigilance by the courts. This is true because the accelerated time schedules impose an enormous burden on protestants attempting to present comprehensive evidence (most of which is in the hands of the railroads) on these complicated issues. The railroad instituting such a proceeding does not face this problem since it can simply wait to file the proceeding until its evidence is prepared. Further, the results of an erroneous ruling in these cases can be devasting since a Capital Incentive Rate, once established, is subject only to *upward* adjustment for a period of five years.

CONCLUSION

All of the foregoing are fundamental, substantial errors in the Commission's decision and decision making process which have operated to the detriment of Petitioners, the State of Texas, and the nation as a whole. This Court should grant the Joint Petition of HLP and AEPC for Writ of Certiorari and upon hearing thereof reverse the instant decisions of the Commission and the Court of Appeals.

In the event this Court is disinclined to grant certiorari in these cases at this time, the State of Texas requests that rather than denying HLP and AEPC's

petition, action be deferred until such time as the issues raised are addressed by this Court in another case. It appears that the issues involved in the Commission's regulation of rates on Western coal are destined to come before the Court. The number of disputes involving these same basic issues is large and growing. The amount of money which turns on the resolution of these issues is massive. The impact of these cases on the national interest is major.

The circumstances discussed at page 16, *et seq*, of the Joint Petition create a pressing need for review of this case either now or following review of some other case deemed by the Court more appropriate for its initial consideration. Therefore, the State of Texas joins in Petitioners' request that this Court not deny certiorari but rather defer action if the Court is unwilling to review these cases at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carl E. Glaze, Assistant Attorney General of Texas, hereby certify that a true and correct copy of the foregoing Brief of the State of Texas has been served by placing same in the United States mail, postage prepaid, on this the 23rd day of January, 1980 addressed to the parties of record.

CARL E. GLAZE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. 79-793

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Petitioner
and
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Petitioner
v.
INTERSTATE COMMERCE COMMISSION, et al.,
Respondents

BRIEF OF THE CITY OF HOUSTON, TEXAS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF OF THE CITY OF HOUSTON, TEXAS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of Houston, Texas, respectfully files this brief as *amicus curiae* in support of the Joint Petition of Houston Lighting and Power Company ("HL&P") and Arizona Electric Power Cooperative, Inc. ("Arizona") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

INTEREST OF THE CITY OF HOUSTON[1]

The City of Houston has a vital interest in the outcome of this case as a regulatory authority setting the rates Petitioner HL&P may charge for electricity sold within the City of Houston and as the lawfully constituted guardian of the public interest.

The City of Houston bears the brunt of the unjustifiably high coal freight rate sanctioned by the ICC and the lower court in this proceeding, because such costs are passed through by HL&P to its customers, most of whom live in the Houston metropolitan area.[2]

The City of Houston is adversely affected by said unreasonably high coal rates in several ways. First, City of Houston residents, particularly those with lower incomes, suffer undue hardship by needless increases in the cost of this basic necessity. Second, City of Houston residents are subsidizing residents in other areas of the country because the coal freight rate charged to HL&P is disproportionately higher than the rates charged on coal moving to other cities. Third, the disproportionately high cost of shipping coal to Houston unfairly and improperly dilutes the competitive advantage enjoyed by Houston businesses in the nation's marketplaces. These adverse effects will continue to worsen as HL&P in-

1. The City of Houston was incorporated on January 28, 1839 (Laws of the Republic of Texas, 3d Congress, 1st Sess.), and is now a home rule city under Art. XI, § 5 of the Texas Constitution. As such it is empowered to "plead and be impleaded in all courts, and to act in perpetual succession as a body politic." (Vernon's Ann. Civ. St., Art. 1175, § 3).

2. 1978 Annual Report of Houston Industries Incorporated (hereinafter, "1978 Annual Report"), page 5.

creases the proportion of its electric power generated from coal.

Therefore, the City of Houston has a most vital interest in overturning the action of the ICC and the court below which errs to the detriment of the public interest of residents in the Houston area.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Aggravate the Upward Inflationary Spiral.

For many years, Houston has relied on the southwest's cheap and abundant natural gas and petroleum reserves to meet its expanding energy requirements. As recently as 1978, natural gas still constituted 98% of the fuel used by HL&P's generating facilities.[3] Beginning in the early 1970's, however, domestic supply shortages and the actions of the Organization of Petroleum Exporting Countries ("OPEC") began rapidly escalating the cost of natural gas and petroleum.

These fuel cost increases have necessitated substantial and consistent increases in HL&P's electric rates. Between 1974 and 1977, for example, the average rate per kilowatt-hour paid by HL&P's residential customers increased by 49%.[4] By contrast, during the same period, the average rate for residential customers in the nation as a whole increased by only 34%.[5] Since 1977,

3. 1978 Annual Report, p. 10.

4. *Id.*, p. 22.

5. Edison Electric Institute, *Statistical Yearbook of the Electric Utility Industry for 1977*, (hereinafter, "1977 Yearbook"), p. 53 (table 45S).

HL&P's fuel costs have continued, this upward spiral. For instance, the company's average fuel cost per "BTU"[6] climbed 19.6% between 1977 and 1978[7]. By the end of 1978, fuel costs had become more than 52% of its revenues.[8]

The escalating cost and scarcity of HL&P's traditional fuels, coupled with the nation's stated energy policy to develop increased reliance on other, more abundant domestic fuels, led HL&P to seek alternative fuel sources. The Company's long term plan includes a gradual shift from natural gas to coal and nuclear power as its predominant fuel sources.[9]

Coal is one of this nation's most important alternatives to the inflationary spiral triggered by OPEC price increases. HL&P's coal conversion program was designed to provide some measure of relief to consumers from ever-increasing electric rates. Although a coal-fired generating station costs five to ten times as much to build as does a gas-fired generating plant of equal capacity,[10] HL&P anticipated achieving long run savings through conversion to coal. Because coal is ordinarily much

6. A "BTU," or "British Thermal Unit," is the amount of energy required to raise the temperature of one pound of water one degree fahrenheit.

7. 1978 Annual Report, p. 22.

8. *Id.*, p. 4.

9. *Id.*, p. 10.

10. Statement of George W. Oprea, Executive Vice President of Houston Lighting and Power Company, April 16, 1979, before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, p. 2. (Hearings not yet printed.)

cheaper per BTU than gas is,[11] increased coal usage should have reduced HL&P's fuel costs over the life of the plant enough to compensate for the higher initial capital cost.

However, HL&P's anticipated leveling off of electricity rate increases dissipated in the wake of the ICC and the Trial Court. Houston residents already must bear the inflationary capital costs of HL&P's $500 million coal-fired generating units at Smithers Lake, Texas, and should be able to anticipate compensatory fuel savings. However, if the decisions below are allowed to stand, they will not receive the appropriate compensating benefit of reduced fuel costs.

The decisions below depart from traditional ratemaking principles in that they permit the railroads to fix their coal freight rate with reference to the higher cost of oil and natural gas and thereby soak up most or all of the price differential between coal and gas. Such a policy allows the ever increasing OPEC prices to affect coal transport and to continue the inflationary spiral.

HL&P established before the ICC that the maximum reasonable rate on its coal traffic under traditional ratemaking principles, would be $10.44 per ton.[12] The $5.16 per ton difference between that rate and the $15.60 rate approved by the ICC requires HL&P's ratepayers to con-

11. 1977 Yearbook, p. 51.

12. See pages 200-206 of the Opening Statement of Fact and Argument filed by HL&P on June 7, 1977 in *Docket No. 36579, Houston Lighting and Power Company v. Burlington Northern Inc., et al.* (This was the "complaint case" which was subsequently mooted by the "capital incentive" case at issue here.) See also The Joint Appendix in No. 77-2070 in the court below, Vol. III, page 602.

tribute an additional $25.8 million per year to subsidize the railroads' non-coal traffic.

The rate authorized by the ICC will cost HL&P customers approximately $40 million more annually than the rate initially quoted by the railroads. In addition, as HL&P approaches 100% conversion to coal, it will need approximately twenty times as much coal as it now uses.[13] In that event, a conservative estimate is that the railroads' extra profits, exacted from HL&P's ratepayers, could exceed half a billion dollars per year. This estimate is even more understated in that it does not take into account future increases in HL&P's fuel requirements as sales continue to grow. The spread between (a) reasonable (cost-based) rail rates, and (b) unreasonable (demand-based) rail rates, which soak up the entire coal/gas price differential, will increase significantly as gas and oil prices continue to rise faster than coal prices.

Regulation operates as a substitute for competition where a monopoly exists in order to prevent price abuse. Instead, the ICC has, in essence, itself based rates on what the market will bear. The ICC discarded comparable rates with similar cost characteristics on the basis that they were "depressed" by competition and chose instead to use a comparable rate standard based on an inflated value of service.

The primary cause of this nation's rampant inflation is the escalating cost of energy, resulting from OPEC's repeated price increases on petroleum, and from the recurring supply shortages of natural gas. The most

13. Hearings, *supra*, note 10.

important alternative available to free this country from its dependance on OPEC triggered inflation is to increase the use of America's abundant domestic coal reserves, which have not been rising in price as quickly as oil and gas. Conversion to coal generated plants is a logical step toward controlling energy cost increases, and thereby abating inflation. The decisions below have frustrated HL&P's efforts to achieve that goal.

Because of the enormous public importance of controlling needless inflation now, the City of Houston respectfully urges the Supreme Court to grant certiorari to review and correct the decisions below.

2. The Disproportionately High Freight Rate on HL&P's Coal Is Unduly Discriminatory to City of Houston Residents.

The freight rate set by the ICC for HL&P coal is substantially in excess of any rate considered reasonable under traditional ratemaking standards. The HL&P coal rate is also substantially in excess of the ICC authorized coal freight rates to other areas of the country.[14] Said rates are unduly prejudicial to the Houston area and unduly preferential to other regions of the country. As such, they are a violation of the fundamental Constitutional principal prohibiting discrimination between communities. "[T]he Commission [ICC], exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field *limited by constitutional rights.*" *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 284 U.S. 248, 252 (1932) (Emphasis added)

14. Joint Appendix in No. 77-2070, Vol. II, pages 60-61, 171-72.

Such discrimination between areas of the country is specifically condemned by the Interstate Commerce Act. This Court recognized in *New York v. United States*, 331 U.S. 284 (1947) that discrimination is the principal evil at which the Interstate Commerce Act was aimed. In furtherance of that central purpose the Act was amended in 1940 to provide:

> *It shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference* or advantage *to any particular* person, company, firm, corporation, association, *locality,* port, port district, gateway, transit point, *region, district, territory,* or any particular description of traffic, in any respect whatsoever; *or to subject any particular* person, . . ., *locality,* . . ., *region, district, territory,* . . ., *to any undue or unreasonable prejudice or disadvantage* in any respect whatsoever . . . . (Emphasis added)[15]

This Court, noting that the references to preference or prejudice to a "region, district, [or] territory" were added in 1940, explained:

> Congress, by adding those words, made plain the duty of the Commission in determining whether discriminatory practices exist to consider the interests of regions, districts, and territories, and to eliminate territorial rate differences which are not justified by differences in territorial conditions. *New York v. United States, supra,* 331 U.S. at 300.

15. Section 3(1) was recodified without substantive change as 49 U.S.C. § 10741(b) by P.L. 95-473, 92 Stat. 1337. As recodified it provides that "A common carrier . . . may not subject a person, *place,* port, or type of traffic to unreasonable discrimination." (emphasis added)

In the case before this Court today, HL&P has demonstrated that, at the time of the hearing before the ICC, the $15.60 coal freight established for HL&P is substantially higher, on a ton-mile basis, than the rates the railroads were then charging on unit coal trains serving other communities.[16]

The Company also demonstrated that the disparities could not be supported by differences in relevant transportation conditions. Far from supporting such disparities, the evidence presented before the ICC supports lower rates for HL&P than for other coal receivers.[17] Yet, both the ICC and the lower Court dismissed HL&P's claims of discrimination on the ground that HL&P had not shown that it was competitively injured by the rate disparities. In so doing they applied the wrong test, contrary to constitutional restrictions and the legislative mandate expressed by this Court in *New York v. United States, supra.*

HL&P did not and could not show competitive harm to itself. As a regulated public utility, it is not in competition with utilities serving other areas. The relevant competitive harm from discriminatory coal freight rates to HL&P is the harm to HL&P's customers, and to the region it serves (in particular, to the City of Houston). The unreasonable coal freight rate disparities artifically inflate the cost of living and the cost of doing business in Houston as compared to cities with preferential coal freight rates. Such rates dilute Houston's natural economic advantage to attract new industries and dilute the competitive strength of existing Houston businesses.

16. Joint Appendix, *supra,* note 15, *loc. cit.*

17. *Id.*

This Court recognized that discriminatory rates can have the effect of impeding industry and arresting area development in the *New York* case:

> We assume that a case of unlawful discrimination against shippers by reason of their geographic location would be an unlawful discrimination against the regions where the shipments originate. But an unlawful discrimination against regions or territories is not dependent on such a showing. As we stated in *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 450, 65 S. Ct. 716, 723, 89 L. Ed. 1051, 'Discriminatory rates are but one form of trade barriers. Their effect is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a State or region, to make it difficult for an agricultural economy to evolve into an industrial one . . . .'
>
> If a showing of discrimination against a territory or region were dependent on a showing of actual discrimination against shippers located in these sections, the case could never be made out where discriminatory rates had proved to be such effective trade barriers as to prevent the establishment of industries in those outlying regions. If that were the test, then the 1940 amendment to § 3(1) would not have achieved its purpose. We cannot attribute such futility to the effort made by Congress to make regions, districts and territories, as well as shippers, the beneficiaries of its anti-discrimination policy expressed in § 3(1). New York v. United States, *supra,* 331 U.S. at 308.

Moreover, while some harm to the disfavored region must still be shown in order for the rate disparity to violate § 3(1), *New York* recognized that

> The causal connection between rate discrimination and territorial injury is not always susceptible of conclusive proof. The extent of that causal relation cannot in any case be shown with mathematical exactness. It is a matter of inference from relevant data. . . .
>
> 'Nearness to markets and ability to ship to markets, on a basis fairly and reasonably related to the rates of competitors, are . . . potent factors in the location of a manufacturing plant. In fact, rate relations are more important to the manufacturer and shipper than the levels of the rates.' 262 I.C.C. 619, 620. *New York v. United States, supra,* 331 U.S. at 310.

In *New York,* the finding of prejudice was made difficult by the fact that very little traffic actually moved at the class rates in question. 331 U.S. at 306-7. No such complication exists here; HL&P demonstrated that the disparity between its rate and those available to other receivers, could cost it (and, therefore, its ratepayers) almost $18 million per year.[18] No clearer case of actual and direct prejudice to the Houston area could be presented.

By focusing solely on injury to HL&P, both the agency and the court below ignored the Court's direction in *New York.* Such interpretation effectively reads the prohibition against inter-regional preferences or prejudices right out of the Interstate Commerce Act. Because of the ominous implications such a narrow reading of § 3(1) holds for our nation's carefully-balanced common carrier transportation network, the City of Houston re-

18. Joint Appendix, *supra* note 15, at page 60.

spectfully urges the Supreme Court to grant certiorari to review and correct the decisions below.

CONCLUSION

The City of Houston recognizes that the railroads must be permitted to charge rates on all their traffic, including coal, that will cover their costs and afford them reasonable profits. However, the City of Houston cannot stand idly by while the ICC sanctions rates on HL&P coal traffic that are far higher than are necessary or reasonable for that purpose, in order to cross-subsidize other regions and other traffic. As the Eighth Circuit noted in *Burlington Northern Inc. v. United States*, 555 F.2d 637,

> . . . the rates for a unit train movement [of coal should be] . . . structured to 'stand on their own wheels'. . . . Unless they are so structured, the consumers of one community may end up subsidizing the consumers of another . . . . The movement of coal in the years ahead will be too important to permit this to happen . . . .

The rate approved on HL&P's coal traffic violates this fundamental principle prohibiting cross-subsidies between communities.

The freight rates established by the ICC for HL&P coal unfairly penalize the residents of Houston by frustrating their efforts to control energy-based inflation. Such rates also unfairly prejudice the ability of Houston and its industries to compete in the national marketplace and have the effect of arresting area development.

For all of these reasons, the City of Houston respectfully urges the Supreme Court to grant HL&P's petition for certiorari to review and correct the decisions below.

Respectfully submitted,

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December 14, 1979

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INTEREST OF AMICUS CURIAE

Amicus Curiae is a member of the United States House of Representatives where he serves as Chairman of its Committee on Interior and Insular Affairs and the Subcommittee on Energy and the Environment. He has represented the second district of the State of Arizona since 1961. In 1976, he was a candidate for President of the United States.

Since 1974, Amicus has been involved on a continuous basis with major aspects of the nation's very grave energy problems which are at the root of the dispute between the railroads and petitioners. Amicus, in recent years, successfully and unsuccessfully has sponsored and led the legislative efforts of the United

State Congress to deal with such important and controversial issues as national standards for the regulation of strip mining, the interstate transportation of coal by slurry pipeline, the preservation of the Alaska wilderness, the creation of an Energy Mobilization Board, the regulation of nuclear energy, and the transportation and delivery of Alaska oil and gas. As a consequence of his legislative experience and background in dealing with energy problems of national scope and impact, amicus perceives an issue of national significance that is both distinct from and broader than the issues presented by petitioners. It is the purpose of Amicus to underscore this circumstance for the Court.

Finally, while petitioners nominally bear and pay the railroad charges here in dispute, the real parties in interest are the electric consumers who ultimately pay these charges as a surcharge to their monthly electric bills. Many of the consumers paying the disputed charges here before the Court are residents of the second district of Arizona. Countless numbers of consumers from other districts will also be directly affected by the direction which is taken by coal transportation pricing. It is essential that the immediate interests of these persons be pressed in the present proceedings.

SUMMARY OF REASONS WHY WRIT SHOULD BE ISSUED

The Congress has been diligent and conscientious in its sustained

efforts to formulate a rational energy policy for this nation. Increased usage of domestic coal is the lynchpin to that policy. We have enacted legislation to foster increased coal usage while protecting our environment in connection with both the mining and the burning of coal.[1/] This carefully formulated approach, however, is going awry because of the unprincipled fashion in which the I.C.C. is administering the new Railroad Revitalization And Regulatory Reform Act Of 1976, Pub. L.

1/ See, e.g., Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 246; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat 685. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445.

No. 94-210, 90 Stat. 33 ("4-R Act") rate-making amendments[2] as they apply to railroad rates on our nation's emerging bituminous coal traffic. In the case of coal, unlike most other fossil fuels, transportation usually constitutes the lion's share of the delivered cost of the fuel. The agency's unreasoned treatment of these critical questions is particularly offensive to Amicus

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2/ These 4-R Act provisions amended existing sections of the Interstate Commerce Act ("Act"), then set out at 49 U.S.C. §1 et seq. Recently, the Congress recodified the Act, without substantive change. See the Revised Interstate Commerce Act ("Revised Act"), Pub. L. No. 95-473, 92 Stat. 1337 (1978). Provisions of the Revised Act now appear at 49 U.S.C. §10101 et seq.

because it is discriminatory as well as irrational and the citizens of Arizona will bear the brunt of this unfair and unlawful discrimination. If our system of government is to function in the best interests of the people, this Court must step in to ensure that the agencies accord a reasoned implementation of the laws enacted by the Congress, especially where the impact of the agency decisions will adversely affect the national welfare.

REASONS FOR GRANTING THE WRIT

(1) The Pricing Of Coal Transportation By Railroad Must Be Governed By Reasoned Standards

These are not the first cases raising consequential questions on how this nation's burgeoning coal transportation will be priced. The first case was Burlington Northern, Inc. v.

United States, 555 F.2d 637 (8th Cir. 1977). There the I.C.C. utilized the traditional determinants for maximum rail rates to prescribe a coal rate at a level two-thirds of that set a year later in Arizona. The court, in rejecting railroad interpretations of the 4-R Act accepted here by the I.C.C. and approved by the court below, stressed at several junctures a point which Amicus believes has a critical application here. Before the new 4-R Act ratemaking standard can be used to make railroad rates, the Commission must issue the rules and guidelines called for in this act and, in particular, the Section 205 "revenue need" guidelines. As to this requirement, the Burlington Northern Court noted:

> The issue of the particular methods to be adopted for realization of the goals established by the 4-R Act must first be decided by the Commission.

555 F.2d at 647

Despite the fact that Congress required the I.C.C. in Section 205 to "develop and promulgate" reasonable standards for implementation of the Section and notwithstanding the earlier refusal of the Eighth Circuit to apply the Section until the standards and procedures were formulated, the agency, in these crucial coal rate cases, plunged ahead without benefit of any rules or regulations to sanction vastly increased freight rates based solely on some ineptly articulated notions of railroad revenue need. While the lower court incorrectly affirmed the un-

reasoned actions because it perceived the I.C.C. determination to be a "temporary approach," the facts are otherwise. Petitioners show that the agency continues to this day to set coal rates in such an erratic and unreasoned manner that one member of the Commission has termed the process as a "wholesale retreat from reasoned decisionmaking." Annual Volume Rates On Coal -- Wyoming To Flint Creek, Arkansas, Docket No. 36970, and Southwestern Electric Power Co. v. Burlington Northern, Inc., Docket No. 26980 (Combined decision served May 25, 1979) (not officially printed) (Dissenting opinion of Commissioner Christian served June 20, 1979 at sheet 1) (not officially printed), appeals docketed sub nom. Burlington Northern, Inc. v. United

States, No. 79-1547 (D.C. Cir., filed May 25, 1979) and Southwestern Electric Power Company v. ICC, No. 79-2082 (5th Cir., filed May 3, 1979). Indeed the United States is cognizant of both the lack of standards and the importance of the coal transportation at issue. In a recent brief challenging the legality of one of the Commission's unreasoned coal rate decisions that followed the actions Petitioners' here attack, the federal government argued that:

> Seldom in the 92-year existence of the Interstate Commerce Commission has the need for informative and intelligible findings been more acute ....

Brief for Respondent United States of America, San Antonio, Texas v. United States, No. 78-2051 (D.C. Cir., filed Oct. 25, 1978).

The Congress in its enactment of Section 205, the Eighth Circuit in the initial judicial encounter with the 4-R Act ratemaking provisions, and the United States of America, are of one voice as to the need for rational railroad rate-making guidelines to govern the rates charged on our nation's emerging and vital traffic in bituminous coal. The I.C.C. stands alone in its cart-before-the-horse approach.

The failure of the I.C.C., abetted by the lower court, to administer the law as enacted by the Congress and in the fashion directed by the Congress, has brought uncertainty and confusion to the important principles of coal transportation pricing.

As an elected representative who is actively engaged in the difficult task of legislating programs to deal with our nation's critical energy problems, Amicus firmly believes that the federal agencies must be particularly sensitive to the impact of their decisions on the programs that the Congress has devised to meet national energy needs. This belief is reflected in the laws passed by the Congress.[3/] To carry out the intent of the Congress, it is absolutely essential that the agencies act in a rational fashion.

3/ See, e.g., The Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 371. (1975) (Federal agencies including the I.C.C. directed to issue energy impact statements in designated major regulatory proceedings.)

Particularly in the area of energy transportation, arbitrary and irrational agency decisions are likely to upset the delicate balance of national economic, social and political interests that the Congress has incorporated into its legislative programs. Because the I.C.C's actions in the coal rate cases lack the essential element of sound decision-making, our nation's energy, inflation and consumer protection policies are thrown into disarray. It is the responsibility and, indeed, the duty of the Court to hear and resolve these questions of indisputable consequence to our nation's future.

In addition, Amicus believes that it is quite likely that the strong opposition to the Commission's decisions now being registered before the federal

circuits will result in a maze of separate opinions that will further exacerbate the present uncertainties. This Court's definitive review is necessary to avoid this unhappy result. Although the Court could wait for the anticipated problems to fester before review, such an action would be of little solace to the petitioners. Due to the peculiarities of the section under which the respondents filed petitioners' rates, this Court's failure to set aside the lower court's decisions will make it impossible for petitioners even to begin to challenge the approved rates until November, 1982.[4/]

4/ The respondents filed their rate schedules pursuant to 49 U.S.C. §10729 immediately after the Commission's November, 1977, decisions. This section states in pertinent part:

The important national interests at stake, combined with the petitioners unfortunate inability to obtain remedial relief without judicial action, makes the decisions entered below particularly ripe for review by this Court at this time.

(2) Coal Rates Which Are Discriminatory Are Manifestly Unfair

The cornerstone of our system of railroad regulation is its absolute proscription against undue discrimination. The rendition of like transportation services to similarly situated shippers at different rates was viewed by the

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> Once a rate, classification, rule or practice become effective under this section, the Commission may not, for five years, suspend or set it aside [as unreasonably high or discriminatory]....

49 U.S.C. §10729(b).

Congress as the greatest evil to be overcome through enactment of the Interstate Commerce Act. As stated in the influential 1886 Senate Report concerning the Act:

> no excuse can be offered for any discrimination in the charges made by a common carrier as between persons similarly situated for whom a like service is performed under similar circumstances. This is the most flagrant and reprehensible form of arbitrary discrimination. Individual favoritism is the greatest evil chargeable against the management of the transportation system of the United States.

S. Rept. No. 46, 49th Cong. 1st Sess. 188 (1886)

Today, some ninety years after the original enactment of the Act in 1887, the language of the Revised Act continues to reflect the Congressional intent to eradicate prejudicial "favoritism."

Prohibitions Against Discrimination By Common Carriers

> (a) A common carrier providing transportaion subject to the jurisdiction of the Interstate Commerce Commission ... may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

Revised Act §10741, 49 U.S.C. §10741.

Despite the long standing resolve of Congress to eradicate unjust discrimination, the I.C.C. has, nevertheless, in its actions below permitted this deplorable situation to occur. As petitioners show, the electric consumers

of Arizona are being made to pay nearly 300 percent more for unit coal train transportation than other similarly situated coal receivers. Clearly, differences of this magnitude constitute a classic example of transportation discrimination.

This Court has observed that a rate may be set at a reasonable level and yet still be unlawfully discriminatory. United States v. I.C.R. Co., 263 U.S. 515, 524 (1924); I.C.C. v. Inland Waterways Corp., 319 U.S. 671, 685 (1943). Accordingly, should the Court conclude that the levels of the assailed rates are somehow the product of reasoned ratemaking, there is no way to justify the resultant flagrant discrimination which has been directed against the electric consumers of the

State of Arizona. If Arizona is made to pay rail rates twice to three times those paid by other coal receivers, we have an unconscionable situation which furnishes an independent basis calling for this Court's review.

CONCLUSION

In the past, and properly so, this Court has supplied definition and direction on important aspects of our nation's drive for energy independence. In Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), the Court gave direction to important questions on the economics of oil pipelines. In Kleppe v. Sierra Club, 427 U.S. 390 (1976), the Court spoke to environmental issues connected with the mining of the coal moving to Houston. The decisions below

involving the economics of coal transportation, in the judgement of Amicus, are at least as consequential to the success of energy and economic independence and deserve this Court's consideration.

Respectfully submitted,

Mo Udall

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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[redacted]

BRIEF AMICUS CURIAE

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Amicus Curiae, Pro Se

November, 1979

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the movement of coal to supplant oil and gas at rates which are consonant with the provisions of the Railroad Revitalization and Regulatory Reform Act and which have been arrived at under sound principles of administrative law.

Your amicus believes that his transmitting the experience obtained through hearings on railroad coal rates by our Subcommittee on Oversight and Investigations may be helpful to the Court, particularly in placing these cases in the context of the immediate and important policy issues and problems of our times. It is your amicus' view that to let the Court of Appeals decision stand would gravely and adversely affect these issues and problems.

Wherefore, the amicus respectfully requests that this motion be granted.

Respectfully submitted,

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Washington, D.C. 20515

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

Houston Lighting and Power Company,
Petitioner

and

Arizona Electric Power Cooperative, Inc.,
Petitioner

v.

Interstate Commerce Commission, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

As a Member of Congress, the amicus curiae has a substantial interest in the outcome of these cases determining railroad rates for coal shipments to the Southwest. This interest is distinct from that of petitioners or respondents.

Your Amicus served on the House Committee which drafted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). This session, he has chaired an extensive series of Congressional hearings concerning the escalation of railroad coal rates since enactment of the 4-R Act.* The amicus also served as a Member of the Ad Hoc Committee on Energy and the House-Senate Energy Conference Committee in the 95th Congress. He continues to serve as a Member of both the Interior and Insular Affairs and the Interstate and Foreign Commerce Committees, the leading energy-writing committees in the House of Representatives.

Finally, should the Interstate Commerce Commission permit the imposition of a multi-billion dollar burden on Southwest industrial and residential consumers without

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*See III of Argument, p. 33

proceeding in the manner required under the 4-R Act, such action would be devastating to this Members' Congressional District and to an entire region of the country.

Therefore, the amicus has a major interest in overturning ICC action which errs to the detriment of the consuming public.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case is in the mainstream of governance of Congressionally delegated authority. Were the decision below upheld it would seriously frustrate Congressional control of agency action.

The kernel of both the erroneous action of the Commission and the error of the Court below is this: the rates established were neither justified under traditional ICC ratemaking principles nor under a new standard established by rule in advance --

as is required by Section 205 of the 4-R Act. This constituted not simply an error of timing or of forum selection but also a major departure from an important, Congressionally mandated process for carrying out Congressional policy and implementing specific statutory standards.

Congress had a difficult task in delineating a fair, practical and reasonable course for affording railroad revitalization and recovery. It was necessary to balance two important needs. Railroads were to be provided adequate revenue levels on condition that they have honest, economical, and efficient management. At the same time, Congress sought to protect the captive shipper where such shipper is not protected by competition--that is, in monopoly markets.

In a matter so fraught with difficult problems of economics and of commercial equity and fairness, the courts must en-

force the clearly mandated procedural process requiring promulgation of standards by rule. Otherwise Congress would have no means of assuring that such important goals were balanced in accordance with its policy determinations.

That is why Congress did not permit in the 4-R Act the kind of case-by-case process which characterizes this proceeding. Section 205 commands establishment of the relevant standard by rule.

The petition before the Court is also extremely important in light of national objectives. The decision below jeopardizes the fulfillment of national energy and anti-inflation goals, and therefore this case is of unusual importance. The decision below will impede efforts to spur coal utilization and to reduce oil imports. Furthermore, the issue is ripe for review in light of extensive development of the facts and

issues by Congress, the executive branch, and the ICC itself.

For these reasons the petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD SERIOUSLY FRUSTRATE CONGRESSIONAL CONTROL OF AGENCY ACTION

The Importance of the Case Transcends that of a Mere Dispute Between the Parties

The importance of the case presented for review transcends that of a mere dispute between interested parties. As the Court of Appeals emphasized, this proceeding involves questions of first impression concerning major provisions of the Railroad Revitalization and Regulatory Reform Act. Pub. L. No. 94-210. Moreover, the specific disposition of this case will heavily influence the degree of public

accountability of numerous federal regulatory agencies.

Since the New Deal and the accompanying erosion of the non-delegation doctrine, Congress has been faced with policy decisions of increasing complexity. These problems are often fraught with highly technical economic and social consequences as well as problems of equity and fairness. There could be no better example of this complexity than that shown in the instant case.

The period beginning just before the Arab oil embargo has also been marked with legislation in which Congress must provide broad substantive delegation and then depend upon procedural mechanisms to assure compliance with legislative intent. The more broadly substantive authority must perforce be granted, the more exactly must the process by which it is implemented be applied if the concepts embodied in the legislation are to be respected.

Congress has sometimes attempted to skirt these problems through the legislative veto process, and the increasing use of this mechanism is evidence of the growth of the problem. See Congressional Research Service of the Library of Congress, Congressional Review, Deferral, and Disapproval of Executive Actions (1976). In other areas, Congress has relied on rulemaking procedures under carefully defined standards specifying both the scope and manner of rulemaking authority. Such is the case in so many recent statutes in the federal agency field that is would be cumbersome in this brief treatment to enumerate them all. A few examples will suffice: the intensely due process oriented FTC rulemaking embodied in the Magnuson-Moss Act, 15 U.S.C. § 57a (1977); the two-level rulemaking in the Toxic Substances Control Act, 15 U.S.C. §2605 (1977); and the requirement of Section 205 of the 4-R Act involved here,

Pub. L. No. 94-210 §205.

Thus it can be seen that such processes as those provided in Section 205 are quintessential to the protection by Congress of its basic policy determination. A careful balance must be obtained between providing railroads with adequate revenue levels and preventing them, in a case where they have market dominance, from obtaining these levels solely or principally from captive shippers through exorbitant rates for a commodity in high demand. If such balance is to be obtained, the process which Congress has delineated for achieving it must be strictly adhered to. Had it known that its procedural directive of rulemaking would be ignored by the Commission and not enforced by the court, Congress would have followed some other course of restraining agency action: the legislative veto or perhaps less delegation to the ICC.

This is a major reason why the decision below must be overturned. If it is allowed to stand, the ICC will succeed in evading the requirements of Section 205 of the 4-R Act which mandate action by rule. Other regulatory agencies will be encouraged to circumvent similar safeguards established by Congress.

The Agency Evaded Congressionally Mandated Rulemaking Requirements

Section 205 of the 4-R Act of 1976 directed the Interstate Commerce Commission to develop and promulgate "reasonable standards and procedures for the establishment of [railroad] revenue levels adequate under honest, economical, and efficient management . . ." by February 5, 1978. Notice and an opportunity for hearing was required. Pub. L. No. 94-210.

When the ICC issued its decision in the Houston Lighting and Power (HL&P) and Arizona Electric Power Cooperative (AEPC)

cases in November, 1977, the agency had initiated but not yet completed a rulemaking proceeding pursuant to Section 205. 42 Fed. Reg. 14740 (1977). However, notwithstanding the pendency of this rulemaking proceeding, the agency premised its rate determinations in these individual cases largely on the basis of the "revenue need" considerations of Section 205.

In the absense of final "revenue need" regulations, the ICC applied arbitrary "revenue need proxy tests" in HL&P. Even the agency admitted that its revenue need "proxy measures would, if anything, contain overstatements." Docket No. 36608, Incentive Rate on Coal--Cordero, Wyoming to Smithers Lake, Texas (Served November 30, 1977) (unprinted), p. 35. However, not to be deterred by this conclusion, the Commission relied heavily on these tests in its rate analysis. Such clearly

unlawful action must not be condoned by the courts. 5 U.S.C. §706(2) (1977). Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (D.C. Cir. 1971).

Petitioners emphasize the argument that Section 205 was not intended to apply in individual rate proceedings such as the HL&P and AEPC cases. In fact, the regulations proposed in March, 1977 to implement Section 205 were limited in application to general rate increase proceedings.[1/] 42 Fed. Reg. 14740 (1977).

However, assuming arguendo that Section 205 is applicable in individual rate proceedings, Congress clearly envisaged

1/ A general rate increase is an increase sought by substantially all railroads involving a substantial number of commodities. 49 C.F.R. §1102.1 (1978).

that consideration of Section 205 principles in such proceedings would await the promulgation of uniform standards and procedures. The ICC must not be allowed to evade this specific Congressional directive, particularly in view of this Court's declaration that "the function of filling in the interstices" of legislation "should be performed, as much as possible, through promulgation of rules to be applied in the future." SEC v. Chenery, 332 U.S. 194, 202 (1947).

Review by this Court is especially critical under the circumstances of these cases. The agency not only ignored required rulemaking procedures. It also overturned long-standing precedents [2/]

2/ As the Court below recognized, under traditional principles which controlled for decades, a carrier's overall revenue needs had no relevance to the determination of an individual rate.

and retroactively applied new standards without any advance notice to the parties.

Thus, it is clear that development of sound principles of administrative law will suffer if the questions posed in these cases remain unanswered. Previous decisions of this Court, decisions of the Circuit Courts, and leading treatises on administrative law all suggest the importance of these questions and the impropriety of the decision below. Morton v. Ruiz, 415 U.S. 199 (1974). Port Terminal R.R. Ass'n v. United States, 551 F. 2d 1336 (5th Cir. 1977). Hill v. FPC, 335 F. 2d 355 (5th Cir. 1964). See also, K.C. Davis, Administrative Law Treatise §7.25 (1979).

Moreover, the "revenue need proxy tests" applied in HL&P did not simply diverge significantly from traditional ratemaking principles. They also departed markedly from subsequent "revenue need"

regulations, 49 C.F.R. §1109.25 (1978), and the agency's statutory mandate.[3/] Thus, they are neither consistent with the directive of the 4-R Act nor are they consistent with traditional ICC ratemaking principles.

The "revenue need proxy tests" result entirely from the inability of the Commission to formulate uniform standards properly and fully before applying any new ratemaking criteria. Had the rate determinations been governed by standards existing prior to or subsequent to the instant cases, the decisions would have been more favorable

3/ For example, the "proxy tests" applied in HL&P at best reflect rough return on net investment estimates. However, the statute, legislative history, and subsequent regulations clearly preclude exclusive reliance on return on net investment estimates as the sole measure of carrier revenue adequacy. 49 U.S.C.A. §10704 (a) (2) (1979). S. REP. NO. 499, 94th Cong., 1st Sess. 52 (1975). 49 C.F.R. §1109.25(a) (1978).

to Southwest consumers. 4/

The 4-R Act states the national policy "to balance the needs of carriers, shippers, and the public." Pub. L. No. 94-210 §101 (b)(1). In interpreting this policy, the ICC has stressed that "consideration of shipper and public interests requires that revenue adequacy be taken not only as a goal but also as a limitation. . . . [w]e are to assist the railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level." Ex Parte No. 338, Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels (Served February 3, 1978) (unprinted),

4/ San Antonio, Texas v. Burlington Northern, Inc., 355 I.C.C. 405 (1976), aff'd sub nom Burlington Northern, Inc. v. United States, 555 F.2d 637 (8th Cir. 1977). Annual Volume Rates on Coal-Wyoming To Flint Creek, Arkansas, Docket No. 36970 and Southwestern Electric Power Co. v. Burlington Northern, Inc., Docket No. 36980, Combined Decision Served May 25, 1979 (unprinted).

pp. 7-8.

Revenue need "proxy tests" developed in an expedited adjudicatory proceeding simply could not provide the delicate balance between carrier, shipper, and consumer needs which the Congress intended.

In Ignoring Rulemaking Requirements, The Agency Acted Arbitrarily and Capriciously

The court below conceded problems with the "proxy tests" adopted by the Commission as "indicia of revenue need." However, it emphasized that its approval of the proposed rates was justified under the governing "standard of judicial review." According to the Court, this standard of review "is narrow in general for ratemaking, and . . . is pinched to the point of exiguity when what is involved is an agency action under a temporary approach in force only pending completion of a more fully considered proceeding."

It is well-accepted that findings of fact based upon substantial evidence are binding upon the courts as well as the parties. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). However, the deference owed an expert tribunal has never encompassed judicial approval of arbitrary or unlawful agency action. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968). This Court has emphasized that "expert discretion is the lifeblood of the administrative process, but unless . . . the requirements for administrative action [are made] strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." Burlington Truck Lines v. United States, 371 U.S. 156 (1962).

Thus, this Court must overturn the decision below because it would permit

the ICC to circumvent the carefully crafted statutory scheme by issuing ad hoc decisions prior to the completion of mandated rulemaking proceedings.

Moreover, the scope of review applied in the decision below is not supported by the precedents cited by the Court of Appeals or 4-R Act policies. Notwithstanding the contention of the court below that "temporary" action deserves extra deference, none of the cases cited support the proposition that arbitrary or unlawful action should be condoned. At most, these decisions stand for the principle that an energy emergency justifies acceptance of agency reasons and findings which are less detailed than those required in non-emergency circumstances.

Nor is the decision below supported by 4-R Act policies. In enacting the railroad reform legislation, Congress substantially limited the workload of the ICC

and the courts by eliminating rate regulation in competitive markets. 49 U.S.C.A. §10709 (1979). By retaining jurisdiction in noncompetitive markets, Congress clearly intended to ensure meaningful agency and judicial review "to protect against abuse of market power." H.R. REP. NO. 725, 94th Cong., 1st Sess. 69 (1975).

II

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD JEOPARDIZE THE IMPLEMENTATION OF NATIONAL ENERGY AND ANTI-INFLATION POLICIES

The petition before the Court is extremely important in light of national objectives. Energy and inflation problems represent the two most urgent issues facing the Nation today. Post-4-R Act rate increases, first approved in the decision below, clash with critical energy and anti-inflation goals.

Expanded coal use and conservation of oil and natural gas represent the major

short-term measures available to cut this Nation's overdependence on imported oil. Congress in its 1978 session underscored its support for these essential policies by enactment of the following four Acts: the Powerplant and Industrial Fuel Use Act, Pub. L. No. 95-620, 92 Stat. 3289 (1978), the Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978), the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978), and the National Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978). The recent ban on Iranian oil imports heightens the need for effective implementation of coal conversion and conservation measures.

Resolution Here Will Help Resolve Many Pending Cases

The implementation of these important national energy policies has been severely impeded by the precedents established in

petitioner's cases. The instant cases initiated a trend which has continued unabated in eight subsequent ICC coal rate cases. All of these later cases are currently on appeal in various United States Courts of Appeal.[5/]

5/ Docket No. 36180, San Antonio, Texas v. Burlington Northern, Served Oct. 25, 1978 (unprinted), reopened and modified in Docket No. 36180, San Antonio, Texas v. Burlington Northern, Served June 1, 1979 (Appeal docketed, No. 78-2051 and 78-2307, D.C. Cir.); Docket No. 36936, Incentive Rate On Coal--Hayden, Colorado To Kings Mill, Texas, Served Nov. 7, 1978 (unprinted) (Appeal docketed, No. 78-3651, 5th Cir.); Docket No. 36970, Annual Volume Rates On Coal--Wyoming To Flint Creek, Arkansas and Docket No. 36980, Southwestern Electric Power Co. v. Burlington Northern, Served May 25, 1979 (unprinted) (Appeals docketed, No. 79-2082, 5th Cir. and No. 79-1547, D.C. Cir.); Docket No. 36719, Arkansas Power & Light Co. v. Burlington Northern, Served June 18, 1979 (unprinted) (Appeal docketed, No. 79-2491, 5th Cir.); I & S No. 9199, Unit Train Rates on Coal-Burlington Northern, Served July 13, 1979 (unprinted) (Appeals docketed, No. 79-1534, 8th Cir. and No. 79-1712, D.C. Cir.); Docket No. 37078, Bituminous Coal, Hiawatha, Utah to Moapa, Nev., 361 I.C.C. 923 (1979) (Appeal docketed, No. 79-1840, 10th Cir.); Docket No. 37063, Increased Rates on Coal-Louisville and Nashville R.R. Co., Served August 29, 1979 (unprinted) (Appeals docketed, No. 79-2090, No. 79-2172 and No. 79-2300, D.C. Cir.); Docket No. 37105, Increased Rates on Coal, Colstrip and Kuehn, Mt. to Minnesota, Served October 26, 1979, (unprinted) (Appeals docketed, No. 79-2295 and No. 79-2286, D.C. Cir.).

In all ten decisions issued since enactment of the 4-R Act, substantial coal rate increases have been authorized. Although the rate treatment in HL&P and AEPC is generally more oppressive on consumers than in the subsequent cases, all of the rates substantially exceed those deemed reasonable under traditional ICC standards. Moreover, in all ten decisions, Section 205 of the 4-R Act was invoked as the primary justification for the rate increase, and the Commission acted on the basis of interim, rather than fully implemented, "revenue need" standards and procedures. [6/]

6/ The HL&P and AEPC decisions were the only decisions issued prior to the promulgation of any "revenue need" regulations. However, all ten decisions were issued

Singling Out Coal Traffic To Bear A Disproportionate Share of Railroad Financing Is Improvident

Beginning with the issuance of the HL&P and AEPC decisions, coal traffic has been singled out to bear a disproportionate share of railroad financing efforts. ICC consideration of Section 205 "revenue need" criteria has been almost exclusively confined to coal rate cases. In these cases, the Commission has required coal shippers to subsidize non-coal traffic without requiring a finding that alternative means for increasing revenues or decreasing costs are foreclosed.

This approach is inconsistent with the agency's continuing obligation to assure the reasonableness of rates in

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prior to the completion of the first annual revenue adequacy proceeding. The Commission's initial regulations, 49 C.F.R. §1109.25, had required the completion of this first annual proceeding by November 30, 1978 but this proceeding remains uncompleted more than eleven months later.

noncompetitive markets. 49 U.S.C.A. §10701 (1979). Moreover, the ICC's action cannot be reconciled with the 4-R Act policy "to balance the needs of carriers, shippers, and the public" or the Act's emphasis on assuring revenue adequacy only under "honest, economical, and efficient management." 49 U.S.C.A. §10704 (a)(2).

However, the ICC action in petitioner's cases is not just inequitable and unlawful. These decisions have severely jeopardized the fulfillment of national energy goals. Unless this Court reviews these cases, widespread litigation will continue and important national policies will continue to suffer.

The Department of Energy has warned that recent ICC ratemaking decisions adversely affect coal conversion efforts. <u>Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on</u>

Interstate and Foreign Commerce, 96th Cong., 1st Sess. (April 16, 1979). Leading national and international energy experts have emphasized that escalating coal tariffs discourage the replacement of existing oil- and gas-fired boilers with coal-fired units. President's Commission on Coal, Special Hearings on Lessening Oil Dependency Through Greater Coal Use (unprinted) (May 29, 1979). International Energy Agency, Steam Coal: Prospects to 2000 (1978), pp. 12, 30, 101.

Moreover, even the ICC's own Office of Policy and Analysis recently conceded that oil imports increase as railroad rates increase. The agency concluded that continued approval of coal rates based on the tests applied in petitioner's cases or the standards applied in subsequent coal rate cases will significantly affect coal consumption and oil import levels. Interstate Commerce Commission,

Draft Environmental Impact Statement, Ex Parte 347, Western Coal Investigation - Guidelines for Railroad Rate Structure (1979). This conclusion is extremely important since it emerges from the ICC's first comprehensive analysis of the energy consequences of escalating coal tariffs.

Although the court below recognized the interest of the public in coal conversion, it justified its decision, in part, on the grounds that "neither the interest of the electric consumer in lower rates nor that of the public in coal conversion dictates that the railroads must receive compensation for their services inadequate to maintain financial soundness." But there is nothing in the decision that demonstrates that the railroads would be unable to maintain financial soundness if the rates had been set at lower levels. Neither the agency nor the court considered

whether the railroads had maximized the contribution of non-coal traffic or aggressively pursued productivity and efficiency improvements. Given the critical energy goals at stake, such arbitrary action must not be allowed to stand.

Anti-Inflation Considerations Require Review of Petitioner's Cases

Anti-inflation considerations also require the court's review of petitioner's cases. In recent months, sharply escalating energy prices have been the major contributor to the double digit inflation rate which threatens this Nation's economy. Since January, 1979, refined petroleum prices have increased 79.5 percent on an annualized basis. In contrast, wholesale coal prices have increased only 3.4 percent during this period.

It is clear that coal offers one of the most important alternatives available to rescue this Nation from the economic de-

vastation of OPEC-triggered energy price inflation. Therefore, it is essential to prevent the railroads from exploiting their monopoly position and expropriating the intrinsic economic advantage of domestic coal supplies.

With respect to the HL&P case alone, the rate authorized by the ICC will cost consumers over $40 million annually above the rate initially quoted by the railroads. This increase amounts to more than a billion dollars over the life of the coal plant. Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (April 16, 1979).

The Commission's Comparable Rate Analysis Is Inconsistent With the Policy of the 4-R Act and Constitutes a Dangerous Precedent

What is even more dangerous is the precedent established by the court below

that the ICC may consider the upward pull of OPEC cartel forces in ratemaking. Under the court's decision, the increased demand for coal transportation following the OPEC oil embargo is entitled to great weight in evaluating comparable rates and in applying other tests of rate reasonableness.

Analyses of rates for traffic with similar <u>cost</u> characteristics (i.e. volume and distance of haulage) have always played a major role in determining maximum rate levels. <u>Burlington Northern, Inc.</u> v. <u>United States</u>, 555 F. 2d 637 (8th Cir. 1977). However, in the HL&P case, comparability was judged largely on the basis of <u>demand</u> rather than cost factors. The Commission discredited comparisons with rates "negotiated prior to the OPEC oil embargo" or "depressed by competition" from other coal sources and relied on a rate deemed to most closely reflect the current value of coal transportation.

The abuse of the comparable rate standard, sanctioned by the court below, deserves this Court's attention. Thousands of utility consumers will pay heavily for reliance on demand-based comparable rates. This factor tipped the scales in the HL&P case in favor of the $15.60 per ton (9.7 mills per ton-mile) rate proposed by the railroads. The cost-based comparable rates proferred by the shippers averaged $17.5 million less on an annual basis than the rate approved by the ICC.

Moreover, the Commission's comparable rate analysis is inconsistent with the policy of the 4-R Act. The entire thrust of the railroad reform legislation is to allow a "wider operation of competitive forces in the marketplace." H.R. REP. NO. 725, 94th Cong., 1st Sess. 69 (1975). By deregulating competitive markets and retaining regulation in non-competitive markets, Congress clearly reflected the

view that regulation should function as a surrogate for competition where competition does not exist. It is inconceivable that Congress intended the ICC to set coal rates in captive markets with reference to rates inflated by OPEC cartel forces.

The Commission's "comparable rate" analysis also runs counter to several important court decisions. Most prominent is an 1897 case, Van Patten v. Chicago, M. & St. P. Ry. Co., 81 F. 545, 550 (1897). See also Aluminum Co. of America v. ICC, 581 F. 2d 1004 (D.C. Cir. 1978).

Given the widespread adverse impact of the decision below, an early and definitive ruling of this Court is sorely needed. The questions at stake affect thousands of individuals and businesses throughout the Nation. Continued uncertainty about future coal rate levels will continue to deter investments in coal-fired facilities and jeopardize the fulfillment of national

energy goals.

III

THE ISSUE IS RIPE FOR REVIEW IN LIGHT OF EXTENSIVE DEVELOPMENT OF THE FACTS AND ISSUES BY CONGRESS AND ADMINISTRATIVE AGENCIES

Because of its interrelationship with so many other important issues of the day (as we have previously pointed out), the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce has examined in great depth the matter of railroad coal rates in markets where there is railroad market dominance. In so doing, we have brought before us a number of agencies which have closely examined various aspects of this matter in their respective fields. Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess.

For instance, the Department of Energy has examined and addressed us concerning the affect of escalating coal rates on conversion of gas- and oil-fueled facilities to coal. The Department of Transportation has testified concerning regulation of captive coal shippers. The ICC has discussed its ratemaking efforts. The Office of Rail Public Council has underscored the procedural disadvantages faced by shippers seeking financial data which is in the exclusive control of the railroads.

The Subcommittee has had before it ten representatives of these agencies as well as a member of the Texas Railroad Commission. Hearings have been held in Washington, San Antonio and Houston, where representatives of municipal and privately owned utilities and railroad spokesmen have appeared. In all, forty witnesses have appeared before the Sub-

committee during six days of hearings.

Facts and policy enunciation have been addressed respecting the HL&P and AEPC cases. We have also developed specific information concerning the major subsequent coal rate cases, particularly the Louisville and Nashville (L&N) proceeding involving a 38 percent rate increase on coal movements to the South and Midwest.

Extensive hearings on the broader question of railroad rate deregulation have proceeded in the Transportation and Commerce Subcommittee of the House Commerce Committee. All told, over ten staff members of the House Commerce Committee have been devoting substantial time to the accumulation of a vast body of information from the agencies, businesses and individuals aforementioned. This is not to mention the work on the yet broader questions involving coal and

energy under investigation by other staffs in the House Committees on Interstate and Foreign Commerce (Energy and Power Subcommittee), on Interior and Insular Affairs, on Public Works and Transportation, and on Science and Technology. Comparable work is going on in the Senate.

These facts not only measure the importance of the matters involved here to the public interest but also show that a decision in this case will facilitate economic planning in a wide swath of business and commerce and avoid costly litigation and delay in the future. Certainly, proceeding with this case is as important for business planning and for meeting energy needs as is the fast track energy legislation now being considered in Congress. H.R. 4985, 96th Cong., 1st Sess. (1979). S. 1308, 96th Cong., 1st Sess. (1979).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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